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No. 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WMCA, INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PAUL R. SCREVANE, et al., APPELLEES, IN SUPPORT OF APPELLANTS

LEO A. LARKIN
Corporation Counsel of the City of New York
Municipal Building,
New York 7, N. Y.
Attorney for Paul R. Screvane, et al., Appellees

GEORGE H. P. DWIGHT
BENJAMIN OFFNER
of Counsel

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PAUL R. SCREVANE, et al., APPELLEES, IN SUPPORT OF APPELLANTS

This brief is submitted by appellee Paul R. Screvane, as President of the City Council of the City of New York, and appellees Denis J. Mahon, James Power, John R. Crews and Thomas Mallee, as Commissioners of the Board of Elections of the City of New York, in support of appellants' claims. The position of these appellees is that of the City of New York and for convenience they are collectively called the City of New York or the City.

The City of New York answered, admitting the allegations of the complaint and joining in plaintiffs' prayer for relief (R. 87-88). In the prior appeal to this Court it submitted a brief in support of appellants' jurisdictional state

ment. See Brief of Abe Stark, *et al.*, *WMCA* v. *Simon*, October Term, 1961, No. 836. At the hearing held by the court below on August 1, 1962, following this Court's vacatur of the prior judgment of dismissal (370 U. S. 190), the City supported appellants' claims and offered Hon. Abraham D. Beame, Comptroller of the City of New York, as a witness to prove certain allegations of the complaint (R. 132, 147).

The City also submitted a brief in support of appellants' jurisdictional statement on the instant appeal. See Brief of Paul R. Screvane, *et al.*, *WMCA* v. *Simon*, October Term, 1962, No. 460.*

The City will not repeat the introductory portions of appellants' brief. It endorses the matters therein set forth as a complete and accurate summary of the jurisdictional facts, the questions presented and the proceedings and opinions below.

Summary of Argument

1. Under the Fourteenth Amendment any apportionment of the New York State legislature must be consistent with the principle of equality of voting power. This principle has been recognized by the law of New York since enactment of the suffrage amendment to the state constitution in

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* Precedent for the City's position may be found in *MacDougall* v. *Green*, 335 U. S. 281 (1948), where Governor Dwight H. Green of Illinois, a defendant in the action and appellee in this Court, argued in support of appellant's contention that the election statute there involved violated the Fourteenth Amendment. Governor Green's argument is outlined in the report of the case in 93 L. ed. 5-6.

1826. The state having adopted a system of government based on the consent of the governed, the Equal Protection Clause protects each individual in the state in the most important aspect of his vote, the right to have it count equally with the vote of each of his fellows. His protected right to choose those who are to exercise the powers of state government over him includes those who are to exercise the legislative power, the power to make laws affecting his life and property. His right to an equal vote for the legislature cannot be impaired by invidiously discriminatory geographic classification.

2. The New York method of legislative apportionment, contained since 1894 in the state constitution, effects by means of invidious discrimination the impairment of the votes of a large number of people in the state, in both houses of the legislature, the Senate and the Assembly, and on every legislative apportionment.

(a) Impairment of votes is produced by certain rules in the constitution, the effect of which is to create two classes of people in the state: those who live in the more populous counties, and those who live in the less populous counties. In each house the more populous counties as a class are apportioned representation in the legislature which is substantially less, in proportion to population, than the representation apportioned to the less populous counties. In this way the vote of a person who lives in one of the more populous counties is under-valued (impaired), and the vote of a person who lives in one of the less populous counties is over-valued.

(b) The geographic classification which impairs the votes of those who live in the more populous counties con-

stitutes an invidious discrimination, in that in both the Assembly and the Senate the discrimination thus effected is intentional, both systematic and long-continued.

3. Assuming *arguendo* that a state may show a reasonable basis for such an intentionally discriminatory impairment of votes, the state offered no proof in this case, and a reasonable basis was not otherwise established. Appellants established at least a *prima facie* case when they proved for each house a substantial impairment of votes, or, alternatively, an intentionally discriminatory impairment of votes by means of geographic classification. The absence of any showing of reasonable basis entitles appellants to the relief sought. Furthermore, as a minimum, the proper rule should be that appellants' proof establishes a *per se* violation of the Fourteenth Amendment, since it includes proof that as a result of discriminatory classification, a substantial majority of the people is reduced to minority representation in *both houses.*

4. Assuming *arguendo* that it is necessary to show arbitrary and irrational elements in an apportionment in order for it to violate the Fourteenth Amendment, such elements are present in New York's. It is utterly irrational to continue to apply a method of legislative apportionment devised in 1894, when today the inevitable result in every apportionment is a substantial impairment of the voting power of the majority in both houses of the legislature. And, among other irrationalities, both the Assembly and the Senate show "horizontal disparities" among counties of the same character, urban or rural.

5. Assuming *arguendo* the significance of a political remedy available to the majority to change the method

of legislative apportionment, no such remedy exists in New York. The only arguable avenue for change, the mandatory referendum on whether to hold a constitutional convention, voted on once every 20 years, is not a practical opportunity for the majority to act. No significance can properly be attached to the 1957 vote against holding a convention.

In short, this court is the last resort of a majority of the people of the State of New York to confirm their right, implicit in the grant of suffrage, to representation in the state legislature on a basis consistent with equality of voting power.

Statement

This section outlines the facts and figures on which the succeeding argument is based. The facts in a legislative apportionment problem necessarily include matters of law; however, we believe that the statements in this section will not be the subject of argument.

The section is divided into two parts: the first deals with the impairment of votes in New York—that is, the population figures compared to legislative representation—and certain of its consequences for state government. The other analyzes the rules involved in the complicated New York method of legislative apportionment and shows how certain of these rules operate to produce the impairment of votes.

By "impairment of votes" in a legislative apportionment we mean an apportionment of a representative in either house of the legislature to a geographic district such that the representative elected by the voters of the district

has a proportionate vote in that house of the legislature which is less than the proportion which the population of the district bears to the total population of the state.

I.

The Impairment of Votes in Voting for the New York Legislature and Its Results

A. The Vote Conferred by the Franchise Has Been Impaired

Since its first constitution in 1777, New York has recognized the franchise as one of the rights and privileges secured to a citizen, and the constitution has expressly provided that no person may be disenfranchised except by due process of law. See N. Y. Const. Art. I §1;* 1 New York State Constitutional Convention Committee, New York State Constitution Annotated 1-2 (1938).

By constitutional amendment adopted in 1826, the franchise was extended to every white male citizen of the age of 21 who satisfied a residence requirement.** The amendment entitled him to equal voting power. See New York State Constitutional Convention Committee, *op. cit. supra*, Part II, at 41. This constitutional provision has continued substantially unchanged to the present time, with only the additional qualification, since 1922, of ability to read and write English. See N. Y. Const. Art. II §1;* *cf.*

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* For text of Article I §1 and Article II §1, see Appendix A.

** The constitution of 1821 broadened the franchise but continued in a modified form the previous property qualifications for voting. See Constitution of 1821 Art. II § 1, New York State Constitutional Convention Committee, *op. cit. supra*, Part II, at 28. The debate over suffrage at the constitutional convention of 1821 arose on a motion by Chief Justice Ambrose Spencer that the Senate should continue to be elected by freeholders (property owners). Chancellor James Kent spoke in favor of the motion, and made the following argument:

U. S. CONST. Ams. XV, XIX; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959).

In the "settled conviction that the safeguarding of our institutions requires the untrammeled exercise of the fran-

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"The growth of the city of New York is enough to startle and awaken those who are pursuing the *ignis fatuus* of universal suffrage. In 1773 it had 21,000 souls; in 1801 it had 60,000 souls; in 1806 it had 76,000 souls; in 1820 it had 123,000 souls.

"It is rapidly swelling into the unwieldy population, and with the burdensome pauperism, of a European metropolis. New York is destined to become the future London of America; and in less than a century, that city, with the operation of universal suffrage, and under skilful direction, will govern this state.

"The notion that every man that works a day on the road, or serves an idle hour in the militia, is entitled as of right to an equal participation in the whole power of the government, is most unreasonable, and has no foundation in justice. * * *"

The motion failed by a vote of 100 to 19, and five years later the suffrage amendment was adopted. See, generally, 1 LINCOLN, CONSTITUTIONAL HISTORY OF NEW YORK 640-52 (1906) (Chancellor Kent's argument is quoted at pp. 646-47); *Johnson* v. *City of New York*, 274 N. Y. 411, 417-19 (1937).

Compare Chancellor Kent's argument with the similar arguments in favor of limiting New York City's representation in the legislature, as expressed during the 1894 constitutional convention. See Appellants' Brief, Appendix C. At the time of the 1821 constitutional convention and thereafter until the constitution of 1894, the legislature, both assembly and senate, was apportioned on the basis of population. See constitution of 1821, Art. I § 6 (senate) § 7 (assembly); constitution of 1846, Art. III § 4 (senate), § 5 (assembly), NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, *op. cit. supra*, Part II, at 25-26, 50-51. See Appellants' Brief, Appendix B.

Although the 1821 and the 1846 constitutions also guaranteed each county at least one assemblyman, in those times this was consistent with apportionment on the basis of population, because of the large size of the assembly (128 members) compared to the then population of the state, and the relatively even distribution of population throughout the state. See p. 56, *infra*. Then as now, both constitutions further provided: "no new county shall hereafter be erected, unless its population shall entitle it to a member." *Id.* at 26, 51; N. Y. CONST. Art. III § 5, par. 1.

chise by the citizens," *People ex rel. Coffey* v. *Democratic Committee*, 164 N. Y. 335, 338 (1900), the New York Court of Appeals adopted a strict construction of the constitutional protection for suffrage. No additional voting qualification can be imposed by the legislature. *Green* v. *Shumway*, 39 N. Y. 418 (1868) (dictum at 426: it would be "extraordinary" if the suffrage provision (Art. II §1) enabled the legislature "to disenfranchise any class of citizens"). A voter is disenfranchised if he is not afforded strict "equality of opportunity" in voting, *e.g.*, *Matter of Crane* v. *Voorhis*, 257 N. Y. 298 (1931).

Despite this grant of equal voting power, the right of a citizen of New York to vote has been substantially abridged through impairment of his vote for one branch of the state government, the legislature—if he happens to be one of the class of people who reside in the heavily-populated counties of the state. A voter in this penalized class has and must have a full and equal vote in a state-wide election for governor, but in choosing his representatives in the legislature New York State allows him only an impaired vote.

The legislative power of the State of New York has always been vested in a two-house legislature, composed of the Senate and the Assembly,* and impairment of votes occurs in both houses of the legislature. It becomes apparent by examining three sets of figures: the 1953 legislative apportionment and the 1950 federal census figures

* See N. Y. Const. Art. III § 1, a provision originally enacted as part of the third constitution of 1846. This provision was derived from substantially identical provisions in the second constitution of 1821 (Article I § 1), and the first constitution (Section II), adopted in 1777 and continued in effect until the second constitution was approved by the people in 1822. See New York State Constitutional Convention Committee, *op. cit. supra*, Part II, at 24, 8.

on which it was based; the pending legislative apportionment based on the 1960 federal census; and, finally, the transitory situation which now exists: the continuing 1953 legislative apportionment, in light of the 1960 federal census figures.

The 1953 Legislative Apportionment Based on the 1950 Federal Census

As a result of the 1953 legislative apportionment, based on the 1950 census, a minority of 38% of the population* of the state was able to elect a majority of the members of the Assembly and a minority of 41% was able to elect a majority of the Senate.**

The City of New York—comprising the five counties of Bronx, Kings (Brooklyn), New York (Manhattan), Queens and Richmond (Staten Island), by far the largest population center in the state—had 53% of the state's population in 1950 yet was apportioned only 43.3% of the assemblymen and 43.1% of the senators in the 1953 apportionment.

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* See p. 17, footnote*, *infra*.

** The figures for percentage representation are determined by arithmetic, in these instances using the total population of the 76 least populous assembly districts and the 30 (in the 1953 apportionment) and 29 least populous senate districts, respectively. The population-per-county figures based on the 1950 and 1960 census, and the 1953 apportionment of the Senate and Assembly appear by stipulation of the parties at R. 226-28. The population-per-district figures for the pending apportionment appear by stipulation of the parties at R. 234 (senate districts partial) and R. 237-40 (assembly districts). The population-per-district figures for the senate apportionments of 1894, 1907, 1917 and 1943 appear in *Preliminary Report to the Joint Legislative Committee on Reapportionment*, N. Y. Legis. Doc. No. 31 (1950), Exhibits I, G, F and B, respectively. For ease of reading, specific citation for apportionment figures contained in the above sources, or interpolated from them, has been omitted in the text.

In the Assembly, the most populous district had a population of 167,226 (one district in Onondaga County; R. 236); the least populous was the district comprising Schuyler County (population: 14,066). Each resident of Schuyler County thus had almost twelve times the representation of a resident of the Onondaga district. New York City's 65 assemblymen represented an average population of 114,436. The 23 least populous counties, each with its own assemblyman, all had populations of less than 47,345—half the state-wide average population per district.

In the Senate the most populous districts were the four of Bronx County, averaging 344,545. The least populous district, the 39th, comprising Essex, Saratoga and Warren counties, had a total population of 146,666. The ratio between each of the four Bronx districts and the least populous district thus was 2.4 to 1. The four densely populated counties of New York City (Bronx, Kings, New York and Queens), were apportioned 24 senators; the average population per district for these counties was 302,221 against the state-wide average of 244,887 per district. At the same time, for example, the 15 upstate districts with more than one county in a district had an average population of 181,617 per district.

The Pending Legislative Apportionment Based on the 1960 Federal Census

A legislative apportionment is pending in New York, based on the 1960 census. See pp. 18-19, *infra*. Under this apportionment, a minority of 37% of the state's population will be able to elect a majority of the Assembly, and a minority of 38%, a majority of the Senate. In both houses minority over-representation will increase substantially over that present in the 1953 apportionment.

The 1960 census shows that New York City now has 46% of the state's population. The pending apportionment will give it only 37.3% of the Assembly seats and 36.8% of the seats in the Senate.

In the Assembly, Schuyler County will continue as the least populous district with 14,974, and the most populous will probably be one district in Monroe County, with a population of 190,343 (R. 237)—a ratio of 12.7 to 1. New York City's 56 assemblymen will represent an average of 132,511 each, as compared to the state-wide average of 108,272 per district. Despite an increase of almost 14,000 in the average population per district in the ten years from 1950 to 1960, the 23 least populous one-assemblyman counties still all show populations of less than half the state-wide average.

For the Senate the district populations will range from a high of 425,267—the average for the three districts in Nassau County—to the probable least populous district, comprising Putnam and Rockland counties (population: 162,840), for a ratio of 2.6 to 1.* New York City's 20 senators will represent an average population of 360,193, compared to the state-wide average of 284,926 per district. The 15 multi-county districts to be created upstate will have an average of only 207,528 per district.

The Continuing 1953 Legislative Apportionment, in Light of the 1960 Federal Census

During the ten years 1950 to 1960 substantial population shifts took place within New York State. As a result

* In making an apportionment the legislature has some discretion in drawing senate district lines for multi-county districts. It is likely, however, that geographic limitations will necessitate the formation of a district comprising Rockland and Putnam counties, in view of the rule requiring districts of equivalent populations.

some areas whose representation may have been fair at the beginning of the decade now are grossly under-represented. A minority of 33% of the state's population is now represented by a majority in the Assembly, and a minority of 41%, by a majority in the Senate.

Nassau and Suffolk, the two fastest-growing counties, are extreme examples of current under-representation. The six assemblymen apportioned to Nassau in 1953 now represent an average population of 212,634; the most populous assembly district in the state is now Nassau's 4th District (314,721). Suffolk's three assemblymen now represent an average population of 216,704, twice the state-wide average per district (108,272). The ratio between the most populous and the least populous district, Nassau's 4th and Schuyler County, is now 21 to 1.

In the Senate, Suffolk County's one senator now represents a population of 650,112 (state-wide average: 280,014). Nassau, whose senate representation will not increase in the pending apportionment, has an average of 425,267 represented by each of its three senate districts. The ratio between the most populous district (Suffolk) and the least populous (Saratoga, Warren and Essex counties) is now 3.9 to 1.

New York City shows different results, because in the 1960 census three of its four densely populated counties, Bronx, Kings and New York, show a population decline from 1950. As a result, the under-representation of its population in the legislature has temporarily decreased. Judge Levet's opinion notes this comparison (R. 297), but ignores the corresponding decrease in New York City's representation that will be mandated as soon as the pending apportionment is enacted. See p. 10, *supra*.

B. The Impairment of Votes in Voting for the Legislature Has Produced Harmful Results

There are at least two harmful results of malapportionment of the New York legislature about which there can be no reasonable disagreement: the handicap which minority domination has imposed on responsible state and local government—the City of New York in particular—and the subversion of the political party system which has resulted from long-continued control of the legislature by the same political party, largely a consequence of the method of legislative apportionment used in New York.

1. Domination of the legislature by a minority of the population has handicapped responsible state and local government. There is general agreement that in the federal system a strong national interest exists in encouraging vigorous and responsible state and local government. See House Comm. on Government Operations, *Federal-State Local Relations: Federal Grants-in-Aid*, H. R. Rep. No. 2533, 85th Cong., 2d Sess. 47 (1958). The decline of the state governments through their failure to solve the problems arising out of the rapid urbanization of the country, and the relationship of this failure to malapportionment of state legislatures, is also generally recognized. See United States Commission on Intergovernmental Relations, Report to the President 38-40 (1955).

New York State is no exception, and the City of New York in particular—by far the largest population center in the state—has suffered from minority domination of the New York State legislature.

At the hearing held by the court below the City offered a witness, Hon. Abraham D. Beame, the Comptroller of the City of New York, to prove the allegation of the complaint that the legislature of the State of New York for a number of years has unjustly discriminated against large segments of the population of the state in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the state through the exercise of its taxing powers (complaint, par. 18, R. 192; see R. 132, 147).*

The court below rejected the City's offer of proof (R. 147), as well as the offer of appellants to prove by competent testimony the material set forth in the affidavit of appellant R. Peter Straus, specifying instances in which the residents of New York City are "short-changed" by legislation enacted by the minority-dominated legislature (R. 149). Such proof is relevant and its rejection without consideration prejudicial error. *See Baker* v. *Carr*, 369 U. S. 186, 194, fn. 15 (1962); *cf. Sincock* v. *Duffy*, 215 F. Supp. 169, 182 (D. Del. 1963), *appeal pending sub nom. Roman* v. *Sincock*, No. 307, Oct. Term, 1963. The substantial adverse effects of state legislation upon the City's legitimate interests can readily be established.** If appellants' position is not otherwise sustained, the minimum action which this Court should take is to reverse the court below on this ground and permit appellants, the City and

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* The opinion of Judge Levet misinterpretes as a concession a statement made by counsel for the City at the hearing (see R. 296). The statement quoted by Judge Levet related only to the City's offer of proof through Comptroller Beame, as the context of the statement plainly shows (R. 147-48).

** See, for example, MAYOR ROBERT F. WAGNER, NINTH ANNUAL REPORT TO THE CITY COUNCIL AND TO THE PEOPLE OF NEW YORK CITY 9 (1963) (unfair restriction on City's debt limit).

Nassau County, which made a similar rejected offer (R. 149), to present their proof.

2. Domination of the legislature by a minority of the population has resulted in harmful one-party control. A consequence of malapportionment of the New York State legislature has been almost-perpetual control of both houses of the legislature by the Republican Party. Since 1919 when Governor Alfred E. Smith first took office, a Republican governor has held office for 19 years, and a Democrat or Democrat-Liberal, for 26 years. During these 45 years, however, the Republican Party lost control of both houses of the legislature for only one year (1935) and lost control of the Senate alone for only three other years (1936-38).

During 22 of those years, therefore, the state has had a governor of one party and a legislature in which both houses were controlled by the opposition.

In the last 25 years the Republican Party has never failed to win at least 55% of the seats in both houses. Yet in the last three elections for the state legislature, for example, the total vote for the Democratic legislative candidates has exceeded the total vote for the Republican candidates:

Election	Vote for Democratic Candidates*	Vote for Republican Candidates*	Democrats Elected	Republicans Elected
Assembly:				
1958	2,735,360	2,712,456	58	92
1960	3,557,043	3,309,830	66	84
1962	2,703,686	2,681,452	65	85
Senate:				
1958	2,732,471	2,703,309	24	34
1960	3,525,787	3,277,503	25	33
1962	2,714,107	2,709,435	25	33

* Includes votes cast on Liberal Party line for endorsed candidates. Source: WELLS, LEGISLATIVE REPRESENTATION IN NEW YORK STATE 8 (1963 ed.)

The partisan atrocity of the 1961 Congressional district gerrymander, see N. Y. STATE LAW §§ 110-12 (Cum. Supp. 1963); WELLS, *op. cit. supra* at 20-28, might well not have taken such an extreme form but for the fact that the Republican majority which enacted the measure was (at that time) secure in the knowledge that those who would suffer from it had almost no chance ever to gain control of the legislature.*

The political party system on which the government of our nation and the states is largely based has been unable to function in a responsible way in a state where one branch of government, the legislature, is in effect assigned to a particular political party. When the majority, if it votes for the gubernatorial candidate of one party, is unable, because its vote has been impaired, to give the same party a working majority in the legislature, "the legislative process must become a process of negotiation—or collusion—between parties rather than one of straightforward execution of a party program." KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 328 (3d ed. 1952).

And neither the people nor the political party system have benefited from the long-entrenched one-party control of the New York State legislature, into which, barring an F. D. R.-inspired sweep, no new broom can reach.

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* Compare the present view of Assembly Speaker Joseph F. Carlino:

> "An adverse decision in the United States Supreme Court on New York State's method of apportioning legislative seats could result in a Democratic legislature, Mr. Carlino pointed out, making him the minority leader of the Assembly, instead of the Speaker."
>
> N. Y. Times, Sept. 8, 1963, p. 42, col. 1.

II.

The New York Method of Legislative Apportionment and How It Impairs Votes

Under the present constitution, both the Senate and the Assembly ostensibly are required to be apportioned on the basis of population. The constitution provides that each senate district "shall contain as nearly as may be an equal number of inhabitants, excluding aliens," N. Y. Const. Art. III §4, par. 1. The constitution also provides that the members of the Assembly shall be apportioned among the several counties of the state "as nearly as may be according to the number of their respective inhabitants, excluding aliens,"* and "no county shall hereafter be erected unless its population shall entitle it to a member." *Id.* §5, par. 1. Since adoption of the constitution of 1894, however, apportionment of the members of the Senate and Assembly has been effected in accordance with the method of apportionment prescribed in the constitution—a method of apportionment which does not apportion either house in proportion to population.** See N. Y. Const. Art. III §§2-5.

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* Since New York uses citizen population as the measure for apportionment purposes, "population" in this brief means citizen population, unless otherwise noted.

** This method of apportionment has continued substantially unchanged from 1894 to the present time. In 1931 provisions with respect to use of the federal census to determine population were added by amendment to Article III §§4 and 5. By amendment adopted in 1945 minor substantive changes were made to facilitate the creation of senate districts and assembly districts within certain counties. See Article III §4, par. 1; §5, par. 4. In addition to prescribing the method of apportionment, the 1894 constitution itself made an apportionment of the legislature, which was superseded by the apportionment statute enacted in 1907. These moot provisions for apportionment of the Assembly were deleted from Article III §5 by the 1934 amendment. See New York State Con-

Although the New York constitution has required that an apportionment of the legislature be made once every ten years, see *id.* §4, par. 1, §5, par. 1, the legislature has enacted an effective apportionment statute on only four occasions since 1894: in 1907, 1917, 1943 and 1953. See N. Y. Laws 1907, c. 727; Laws, 1917, c. 798; Laws 1943, c. 359; Laws 1953, c. 893. Apportionment statutes enacted in 1906 and 1916 were held invalid by the New York Court of Appeals as not in compliance with the method of apportionment prescribed in the constitution. See *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185 (1907); *Matter of Dowling*, 219 N. Y. 44 (1916). The validity of the apportionment statute enacted in 1907 was challenged in 1911, but the court of appeals refused to pass on its constitutionality because of the objector's laches in waiting until after four elections had been held. See *Matter of Reynolds*, 202 N. Y. 430 (1911). The validity of the statute enacted in 1943 was sustained in *Matter of Fay*, 291 N. Y. 198 (1943).

The 1953 apportionment is now in effect in New York State. See N. Y. STATE LAW §§121, 123. The New York constitution requires that a new legislative apportionment be effected before 1967, on the basis of the 1960 census figures. See N. Y. CONST. Art. III §4, par. 1. While New York law has been that no remedy exists if the legislature fails to reapportion as required, *Burns* v. *Flynn*, 268 N. Y. 601 (1935), a reapportionment almost certainly will be

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STITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937 184-87 (1938). The corresponding provisions for the 1894 apportionment of the Senate were deleted by an amendment approved by the voters in the general election of 1962. See N. Y. CONST. Art. III §3 (Cum. Supp. 1963). All apportionments since the apportionment made in the 1894 constitution have been made by statute.

enacted promptly. The governor and a majority of both houses of the legislature are of the same party, and the majority party will gain seats in both houses on a reapportionment. See JEWELL, THE POLITICS OF REAPPORTIONMENT 239-40 (1962).

The county is the basic geographic unit for the purpose of apportioning both the Senate and Assembly. No county may be divided in forming a senate district, except to make two or more districts wholly within the county. N. Y. CONST. Art. III § 4, par. 1. Assemblymen are apportioned by counties, *id.* § 5, par. 1, the exception being that two sparsely-populated upstate counties, Fulton and Hamilton, are treated as a single county in apportioning the Assembly. *Ibid.* There are 62 counties in the state.

The number of senators is fixed at not less than 50 and may vary with each apportionment. *Id.* § 2, § 4, par. 3. In the 1953 apportionment it was 58; in the pending apportionment based on the 1960 census it will be 57. The number of assemblymen is fixed at 150. *Id.* § 2. Both senators and assemblymen are elected for two-year terms, on the even-numbered years. *Ibid.*

In the ten-year period from 1950 to 1960 the population of New York State increased from 14,203,449 to 16,240,786.

The method of apportionment prescribed in the New York constitution results in a substantial impairment of the voting power of the majority of the population of New York State—in both the Senate and the Assembly and on every apportionment—primarily because the legislature in making an apportionment is required by the constitution to follow certain rules the inevitable effect of which is to limit the representation of the most populous counties.

The remainder of this section outlines the rules for apportioning the Senate and the Assembly, with emphasis on those which limit the representation of the most populous counties, illustrated by examples of how these rules have operated in the apportionment now in effect, and how they will operate in the pending apportionment based on the 1960 census—unless this Court holds New York's method of legislative apportionment invalid under the Fourteenth Amendment.*

A. Apportionment of the Senate

The members of the Senate are apportioned by two different methods: by one method to each county which has 6% or more of the state's population and by another method to the other counties of the state. In senate representation, therefore, the population of the state is divided into two classes: those who live in the counties each of which has 6% or more of the state's population and those who live in the rest of the state. This two-class discrimination in apportionment of the Senate results in a systematic undervaluation of the vote of a person who lives in one of the 6%-or-more counties and a systematic over-valuation of the vote of a person who lives elsewhere in the state.

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* For a more detailed analysis of the New York apportionment rules and their historical background see Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581 (1962) (senate apportionment), Silva, *Apportionment of the New York Assembly*, 31 FORDHAM L. REV. 1 (1962). See also WELLS, LEGISLATIVE REPRESENTATION IN NEW YORK STATE (1963 ed.). Professor Silva was appellants' expert witness at the trial (R. 154).

In the present apportionment only five counties are in the 6%-or-more class: Bronx, Kings, New York and Queens counties, all within the City of New York, plus upstate Erie County (Buffalo and environs). Nassau County, a suburb of New York City, will be added to this class in the pending apportionment based on the 1960 census.

In the present apportionment the five 6%-or-more counties had 57% of the total population of the state, but only 47% of the senate representation. In the pending apportionment this disparity will increase: the six counties, which now have 59% of the state's population, will be apportioned only 46% of the Senate. This impairment of the voting power of the population of these counties is caused primarily by two rules (discussed *infra*) which the state constitution requires the legislature to observe in making a senate apportionment: the "full-ratio" rule and the rule requiring an increase in the total number of senators.

1. **Apportionment of senators to a county having 6% or more of the state's population.** The first step in apportioning the Senate is to determine the (constitutional) ratio, which under the constitution must be obtained by dividing the state's total population by 50, the number of senators in the 1894 apportionment, N. Y. Const. Art. III §4, par. 3.

The next step is to apportion one senator for each full ratio of population to each county that has at least three full ratios, or 6% of the state's population. In the 1953 apportionment 27 senators were apportioned on this basis to the five most populous counties:

County	Number of Senators	Population (Ratio = 284,069)
Kings	9	2,595,187
New York	6	1,795,726
Queens	5	1,484,214
Bronx	4	1,378,181
Erie	3	878,502
	27	8,131,810

In the pending apportionment, 26 senators will be apportioned to these counties, with Nassau being added:

County	Number of Senators	Population (Ratio = 324,816)
Kings	7	2,518,510
Queens	5	1,733,081
New York	4	1,584,069
Bronx	4	1,368,207
Nassau	3	1,275,801
Erie	3	1,039,648
	26	9,519,316

2. The "full-ratio" rule. The constitution contains certain rules which were devised by the constitutional convention of 1894 in order to limit the senate representation of New York and Kings counties, the only counties in the state which at that time had 6% or more of the state's population. One of these rules is the "full-ratio" rule, which has applied in each subsequent senate apportionment.* It pro-

* The other two rules devised to limit the senate representation of New York and Kings counties are: (1) No county shall have more than one-third of all the senators; and (2) No two counties or the territory thereof as organized in 1894, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators. See N. Y. CONST. Art. III § 4, par. 2. Because of subsequent population trends, these rules have never been applicable in an apportionment, and it is unlikely that they ever will apply.

vides: "No county shall have four or more senators unless it shall have a full ratio for each senator." N. Y. Const. Art. III §4, par. 2. Mainly because of population trends within the state since 1894, the "full-ratio" rule has come to apply not only to New York and Kings counties but to other counties as well. Bronx County was created from part of New York County in 1914 and became one of the 6%-or-more counties in the 1917 apportionment. As the population of the New York City area has expanded outwards, the counties of Queens (since the 1943 apportionment), and now Nassau have reached the 6% level. In addition, Erie County upstate has had just over 6% of the state's population on each apportionment after 1894.

The "full-ratio" rule is a major cause of the discrimination against the population of these counties in senate representation. Unlike other counties, a county which has 6% or more of the state's population cannot receive an additional senator for any remainder in population which is less than a full ratio, however large this remainder may be. When the population remainder is small, the "full-ratio" rule has no effect, since a small population remainder would not otherwise entitle a 6%-or-more county to an additional senator. However, the number of 6%-or-more counties is sufficiently large so that the likelihood is that in every apportionment several of them will be deprived of an additional senator by the rule, thus producing a substantial under-representation of the population of the county so affected and of the 6%-or-more counties taken as a class.

To illustrate, in the 1953 apportionment Bronx County and New York County were each denied an additional senator by the "full-ratio" rule. Bronx County's unrepre-

B. Apportionment of the Assembly

Like the Senate, the members of the Assembly are apportioned by different methods to different classes of counties, and the rules contained in the state constitution assure that the most populous counties as a class will be substantially under-represented. The primary cause of such under-representation in the Assembly is the rule requiring that each county be apportioned one assemblyman, regardless of its population (except for Fulton and Hamilton counties, which are treated as one district for this purpose). See N. Y. Const. Art. III §5, par. 1.

The constitution sets the size of the Assembly at 150; the ratio for apportioning assemblymen is determined by dividing the state's total population by this number. *Id.*, par. 2. The constitution divides the 61 counties into three classes:

(1) *First-class counties*: a county which has less than 1% of the state's population;

(2) *Second-class counties*: a county which has between one and one-half and two assembly ratios (1 to 1⅓% of the state's population); and

(3) *Third-class counties*: a county which has 1⅓% (two assembly ratios) or more of the state's population.

The third-class counties are the counties whose population is substantially under-represented in the Assembly. In the 1953 apportionment there were 12 third-class counties, which contained 77% of the state's population, but were apportioned only 65% of the assembly seats. In the pending apportionment there will be 14 third-class counties, containing 80% of the state's population but to be apportioned only 67% of the Assembly. All of the counties with

6% or more of the state's population, the class of counties whose population is substantially under-represented in the Senate, are, of course, included among the third-class counties in apportioning the Assembly.*

The first step in apportioning the Assembly is to apportion one assemblyman to each county. An additional assemblyman is then apportioned to each of the other counties, that is, the counties of the second class** and third class. Finally the remaining assemblymen are apportioned among the third-class counties, roughly according to population.

A combination of factors makes the Assembly today even less representative of population than the Senate: the guarantee of at least one assemblyman to each of the 61 counties, while the total number of assemblymen is fixed at 150, and the rule which creates counties of the second class. Also the fact that the population of New York State is unevenly distributed—increasingly concentrated in the metropolitan areas with a continuing relative decline in the population of the sparsely-populated upstate rural counties.

To summarize the 1953 apportionment of the Assembly and the pending apportionment based on the 1960 census:

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* In the 1953 apportionment the five 6%-or-more counties (57% of the state's population) had 47% of the assembly seats. In the pending apportionment the six 6%-or-more counties, with 59% of the state's population, will have 48% of the Assembly.

** The classification for counties of the second class—counties which have between one and one-half and two assembly ratios of population—is an anachronism. It contributes to the under-representation of the population of the third-class counties, and was originally intended to increase the assembly representation of the nine counties which were in this class in 1894. See 3 NEW YORK STATE CONSTITUTIONAL CONVENTION (1894), REVISED RECORD 1031-32 (1900). In the 1953 apportionment, however, there were only four counties in this class: Broome, Niagara, Orange, and Richmond. There will be only three —Broome, Dutchess and Orange—in the pending apportionment.

PENDING APPORTIONMENT BASED ON 1960 CENSUS

Third-Class Counties*	Population	Assemblymen	Average Population per Assemblyman
Bronx	1,368,207	10	136,821
Albany	269,088	2	134,544
Queens	1,733,081	13	133,314
Kings	2,518,510	19	132,553
New York	1,584,069	12	132,006
Westchester	782,179	6	130,363
Suffolk	650,112	5	130,022
Erie	1,039,648	8	129,956
Oneida	259,330	2	129,665
Nassau	1,275,801	10	127,580
Niagara	235,677	2	117,839
Monroe	571,029	5	114,206
Richmond	216,764	2	108,382
Onondaga	414,770	4	103,693
Subtotal	12,918,265	100	129,183
Second-Class Counties			
Broome	209,597	2	104,799
Orange	179,873	2	89,937
Dutchess	171,395	2	85,698
Subtotal	560,865	6	93,478
First-Class Counties			
45 counties (least populous—Schuyler—14,974) (most populous—Schenectady 150,688)	2,761,656	44	62,765
Entire State	16,240,786	150	108,272 (ratio)

APPORTIONMENT OF 1953

Third-Class Counties*	Population	Assemblymen	Average Population per Assemblyman
Monroe	475,037	4	118,759
Kings	2,595,187	22	117,963
Albany	234,068	2	117,034
Bronx	1,378,181	12	114,848
Queens	1,484,214	13	114,170
New York	1,795,726	16	112,232
Onondaga	334,453	3	111,484
Erie	878,502	8	109,812
Nassau	655,690	6	109,281
Oneida	216,486	2	108,243
Westchester	601,682	6	100,280
Suffolk	261,003	3	87,001
Subtotal	10,910,229	97	112,477
Second-Class Counties			
Richmond	185,032	2	92,516
Niagara	184,161	2	92,080
Broome	181,496	2	90,748
Orange	148,429	2	74,214
Subtotal	699,118	8	87,390
First-Class Counties			
46 counties (least populous—Schuyler—14,066) (most populous—Schenectady—139,304)	2,594,102	45	57,648
Entire State	14,203,449	150	94,689 (ratio)

* "Remaining members" apportioned to third-class counties on the basis of the so-called Brown formula. See R. 22-23.

To round out the procedure for apportioning the Assembly, as in the case of the Senate the constitution prescribes certain districting rules, some of which appear to be mandatory, and some merely directive. N. Y. Const. Art. III §5, par. 4; *cf. Matter of Sherrill* v. *O'Brien, supra.*

Mandatory rules:

(1) The number of assembly districts in a county shall be equal to the number of assemblymen to which that county is entitled—that is, a multi-member county shall be divided into single-member districts, and assemblymen apportioned to a county cannot run in the county at-large.

(2) Each assembly district shall consist of contiguous territory.

(3) Each assembly district shall be wholly within the same senate district.

(4) In a county having more than one senate district, the same number of assembly districts shall be placed in each senate district, unless the assembly districts cannot be evenly divided among the county's senate districts, in which case one more assembly district shall be put in such county's most populous senate district, or one less assembly district shall be put in that county's least populous senate district.

(5) No town, except a town having more than one and one-half assembly ratios (1% of the state's population), and no city block enclosed by streets or public ways shall be divided in the formation of assembly districts.

(6) No assembly district shall contain a greater excess of population over an adjoining assembly district in the

same senate district than the population of a town or block therein adjoining such assembly district.

DIRECTIVE RULES:

(1) Towns or blocks which, from their location, may be included in either of two assembly districts shall be so placed as to equalize the two districts.

(2) Each assembly district in the same county shall contain, as nearly as may be, an equal number of citizen inhabitants.

(3) Each assembly district shall consist of "convenient" territory.

(4) Each assembly district shall be as compact as practicable.

sented remainder was 241,905 over four full ratios of population. Consequently, its four senate districts had by far the largest population per district of any in the state. Each Bronx district had a population of about 344,545 against the state-wide average of 244,887 per district. The population of each Bronx district was greater than *the entire population* of Onondaga County upstate (334,453), which nonetheless was apportioned *two* senators.

In the pending apportionment based on the 1960 census, Nassau, New York and Kings counties will each be deprived of an additional senator:

	Senate-seat Remainder
Nassau	301,353
New York	284,805
Kings	244,798
	830,956

(See Plaintiffs' Exhibit 1, R. 180, 243.)

Thus in effect over 800,000 residents of those counties will not be counted in the apportionment of senate seats; their existence is ignored. The result, for example, is that the three senate districts of Nassau County will have an average population of 425,267, as against the state-wide average of 284,926 per district. By contrast, Monroe County upstate will receive the *same* number of senators as Nassau, although Monroe's population of 571,029 is *less than half* that of Nassau (1,275,801). Onondaga County (population: 414,770) will again be apportioned *two* senators, despite the fact that each of Nassau's three senate districts will have a population larger than all of Onondaga County.

3. The rule requiring an increase in the number of senators. The other major cause of discrimination against the

counties having 6% or more of the state's population is the rule requiring an increase in the number of senators, as it has been interpreted by the New York Court of Appeals.

After apportioning senators to each of the counties which has 6% or more of the state's population, the legislature must determine the size of the Senate. The constitution provides:

> "• • • the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent." N. Y. CONST. Art. III §4, par. 3.

As interpreted by the court of appeals, the number of senators to be added is determined by comparing the number of senators to which each of the 6%-or-more counties is entitled under the new apportionment with the number apportioned to it in the 1894 apportionment. When the county has been divided since 1894—as is the case with New York (part of which became Bronx County in 1914, see N. Y. Laws 1912, c. 548) and Queens (part became Nassau in 1899, see N. Y. Laws 1898, c. 588)—the number of senators apportioned to the counties comprising substantially the same territory as was contained in such original county is compared with the number of senators given such county in the 1894 apportionment. Any increase resulting from such comparison is added to 50 to give the whole number of senators, and *all* the additional senators are apportioned to the counties which each have less than

6% of the state's population. See *Matter of Fay, supra; Matter of Dowling, supra.*

In the 1953 apportionment the total number of senators was thus increased to 58:

County	In 1894	In 1953	Increase
Kings	7	9	2
New York	12	6	0
Bronx		4	
Queens	1	5	6
Nassau		2*	
Erie	3	3	0
		Total increase	8

In the pending apportionment the total number of senators will be 57:

County	In 1894	Based on 1960 census	Increase
Kings	7	7	0
New York	12	4	0
Bronx		4	
Queens	1	5	7
Nassau		3	
Erie	3	3	0
		Total increase	7

Senators are apportioned to the 6%-or-more counties on the basis of the constitutional ratio (population of the state ÷ 50), which is substantially larger than the actual population-per-district figure, since in any current apportionment the number of senators must be increased to well above 50. A county with 6% or more of the state's population is thus barred from representation in the Senate proportionate to its population. In fact, the arithmetic re-

* Nassau was apportioned a third senator on the second ratio. See p. 27, *infra*.

sult is that the comparative voting power of the population of the 6%-or-more counties *decreases* as their share of the state's total population *increases*.

The dilution effect of this provision has been further increased by judicial interpretation. As the rule has been interpreted, no decrease in the total number of senators is to be recognized if a county which has 6% or more of the state's population in an apportionment should happen to be entitled to fewer senators than it was apportioned in the 1894 apportionment. See *Matter of Fay, supra*. For example, in the 1953 apportionment New York and Bronx counties together had two less senators than New York (which then included part of Bronx) had in 1894; in the pending apportionment they will have four less. In each instance these senators must remain in the total number to be apportioned. As a result they must be apportioned to the counties other than the counties which each have 6% or more of the state's population: the New York City counties of Bronx, New York, Queens and Kings, Erie County and, in the pending apportionment, Nassau County.

4. Apportionment of the remaining senators. After senators have been apportioned to each county which has 6% or more of the state's population and the size of the Senate has been determined, the next step is to apportion the remaining senate seats, including all the additional seats, to the other counties. In the 1953 apportionment 31 senators remained to be apportioned. The same number will be available in the pending apportionment.

In order to apportion the remaining senators, a second ratio must be determined: a population-per-district figure

obtained by dividing the number of senators remaining into the total population of the counties other than the counties in the 6%-or-more class. Senators are apportioned to counties in the 6%-or-more class on the basis of the constitutional ratio; they are apportioned to the other counties on the basis of this second ratio.*

The legislature has discretion in apportioning the remaining seats—including the additional seats—to the counties on the basis of the second ratio. In practice each of the other counties is apportioned a senator for each full second ratio, and a major fraction thereof, and a county with a population close to but less than one full second ratio receives one senator. The balance of the senators remaining is then apportioned by creating multi-county districts of roughly equal populations.

The disparity between the population-per-senator figures for the counties in the 6% or more class and the other counties is substantial:

		Population	÷	Number of Senators	=	Population per Senator
1960 *(pending)*	6%-or-more counties	9,519,316		26		366,128
	all other counties (second ratio)	6,721,470		31		216,822
	Entire State	16,240,786		57		284,926
	(constitutional ratio)	"	÷	50		324,816
1953	6%-or-more counties	8,131,810		27		301,178
	all other counties (second ratio)	6,071,639		31		195,859
	Entire State	14,203,449		58		244,887
	(constitutional ratio)	"	÷	50		284,069

(See Plaintiff's Exhibit 2, R. 180, 244)

* In adopting appellees Simon and Lefkowitz' summary of the method of apportioning the Senate (R. 297-98), the court below misstated the method, by failing to note that the constitutional ratio (population of the state ÷ 50) is used *only* in apportioning senators to a county which has 6% or more of the state's population. *Cf. Matter of Fay, supra.*

The 1953 apportionment and the pending apportionment based on the 1960 census may be summarized as follows:

PENDING APPORTIONMENT BASED ON 1960 CENSUS

County	Population	Senators on basis of constitutional ratio = 324,816	Average Population per Senator
Nassau	1,275,801	3	425,267
New York	1,584,069	4	396,017
Kings	2,518,510	7	359,787
Queens	1,733,081	5	346,616
Erie	1,039,648	3	346,549
Bronx	1,368,207	4	342,052
Subtotal	9,519,316	26	366,128
		on basis of second ratio = 216,822	
Albany	269,088	1	268,088
Westchester	782,179	3	260,726
Oneida	259,330	1	259,330
Niagara	235,677	1	235,677
Richmond	216,764	1	216,764
Suffolk	650,112	3	216,704
Broome	209,597	1	209,597
Onondaga	414,770	2	207,385
Monroe	571,029	3	190,343
Subtotal	3,608,546	16	225,534
Multi-county districts	3,112,924	15	207,528
Entire state	16,240,786	57	284,926

APPORTIONMENT OF 1953

County	Population	Senators on basis of constitutional ratio = 284,069	Average Population per Senator
Bronx	1,378,181	4	344,545
New York	1,795,726	6	299,287
Queens	1,484,214	5	296,842
Erie	878,502	3	292,834
Kings	2,595,187	9	288,354
Subtotal	8,131,810	27	301,178
		on basis of second ratio = 195,859	
Suffolk	261,003	1	261,003
Monroe	475,037	2	237,518
Albany	234,068	1	234,068
Nassau	655,690	3	218,563
Oneida	216,486	1	216,486
Westchester	601,682	3	200,561
Richmond	185,032	1	185,032
Niagara	184,161	1	184,161
Broome	181,496	1	181,496
Onondaga	334,453	2	167,226
Subtotal	3,329,108	16	208,069
Multi-county districts	2,742,531	15	181,617
Entire state	14,203,449	58	244,887

5. **Miscellaneous other rules.** To complete the picture, the constitution contains certain other rules for creating districts, some of which are mandatory, others merely directive. N. Y. Const. Art. III §4, par. 1; See *Matter of Sherrill* v. *O'Brien, supra.*

The following rules are mandatory:

(1) No county shall be divided in the formation of a senate district except to make two or more senate districts within such county. This rule alone may cause a substantial disparity between the populations of particular districts, in a particular apportionment.

(2) Each senate district shall consist of contiguous territory.

(3) No senate district shall contain a greater excess of population over an adjoining district in the same county than the population of a town or block therein adjoining such district.

(4) No town, except a town having a population in excess of a full constitutional ratio (2% of the state's population), and no city block enclosed by streets or public ways, shall be divided in the formation of senate districts.

The following are directive, rather than mandatory:

(1) Each senate district shall contain, as nearly as may be, an equal number of citizen inhabitants.

(2) Each senate district shall be in as compact form as practicable.

(3) Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to equalize the number of citizen inhabitants in the two districts.

A mandatory rule must be followed in an apportionment and takes precedence over a directive rule. The legislature has discretion in choosing the rule to follow when two mandatory or two directive rules conflict. *See Matter of Sherrill* v. *O'Brien, supra* at 205.

(b) Under the Fourteenth Amendment any apportionment of the New York legislature—both houses—must be consistent with the principle of equality of voting power.

By either argument no defense of justification is available to the State.

(a) *The New York method of legislative apportionment is a* per se *violation of the Fourteenth Amendment.* The New York legislative apportionment statute mandated by the New York constitution impairs votes as a result of an invidious discrimination against a particular class of people in the state. This discrimination occurs in both the Assembly and the Senate. As a result, in each house a majority of the people is reduced to minority representation—representation which is substantially less than representation proportionate to population.

Such a situation is intolerable in a democracy. A minimum ground rule under *Baker* v. *Carr* must be that no justification can be made for an invidiously discriminatory system which delivers both houses of the legislature to minority rule. *See, e.g., Sincock* v. *Duffy, supra* at 189; *Toombs* v. *Fortson*, 205 F. Supp. 248, 257 (N. D. Ga. 1962); *Baker* v. *Carr*, 206 F. Supp. 341, 349 (M. D. Tenn. 1962). A legislative apportionment which thus impairs the voting power of the majority in both houses is *per se* invalid. If the minority were allowed to justify the continuation of such an apportionment on any ground whatever, the door would be opened to nullify the practical significance of *Baker* v. *Carr*. Procedurally, if not substantively, the exception of justification would prove to be as broad as the rule itself.

Furthermore, once such an apportionment is in effect, the size of the minority representation afforded the majority is relatively unimportant. Once a minority is assured of working control of both houses of the legislature—a margin of control beyond a bare majority—the damage is done. The majority then has lost any practical opportunity for exerting its political weight in voting for the legislature, *see MacDougall* v. *Green*, 335 U. S. 281, 284 (1948).

(b) *Any apportionment of the New York legislature must be consistent with the principle of equality of voting power.* Although we recognize that its reasoning is expressly limited to a state-wide election, *Gray* v. *Sanders*, 372 U. S. 368 (1963), nonetheless takes the position that once a state chooses the class of voters and specifies their qualifications, there is no constitutional way by which the state can evade equality of voting power, however reasonable may be the state's policy in seeking to do so. *See id.* at 381, 370. As previously discussed, see pp. 6-8, *supra*, equality of voting power is inherent in the grant of suffrage made by the State of New York. It establishes but one class of voters throughout the state, all of whom are required only to meet specified qualifications. The City's argument is simply that New York having granted everyone this right to vote, the Equal Protection Clause assures each individual in the state that, having qualified to vote, his vote will have equal weight, whether he is voting for the governor, a state senator or an assemblyman. When the people of a state in a state-wide election choose the members of the legislative body which is to make laws for everyone in the state, an equal say in this choice is of no less importance to each individual than the equal say the

ARGUMENT

POINT I

The New York method of legislative apportionment results in an arbitrary impairment of votes by means of individiously discriminatory geographic classification.

This Court has stated the holding of *Baker* v. *Carr* to be:

> "* * * that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification." *WMCA* v. *Simon*, 370 U. S. 190, 191 (1962).

The City contends that a legislative apportionment is invalid if it results in impairment of votes by means of invidious discrimination (see Subhead *A*, *infra*). We there argue that an apportionment which systematically discriminates against classes of people within a state—as does New York's—is equally as invalid as an apportionment which, as a result of population shifts and the legislature's long-continued failure to enact a reapportionment, no longer evidences any discernible pattern but is instead an irrational "crazy quilt"—like the Tennessee apportionment involved in *Baker* v. *Carr*.

However, even if elements of arbitrariness and irrationality must be found in the New York method of legislative apportionment to invalidate it under the Fourteenth Amendment, such elements exist (see Subhead *B*, *infra*).

A. The New York Method of Legislative Apportionment Results in Invidious Discrimination against the Voting Power of Particular Classes of People by Means of Geographic Classification

When this Court stated the invalidity of a state legislative apportionment in terms of "invidious discrimination," *see WMCA* v. *Simon*, *supra* at 191, it adopted a test which has recognized standards in other fields of constitutional law. State action which results in an impairment of the voting power of people in the state is invalid under the Fourteenth Amendment if there is present the element of "intentional or purposeful discrimination between persons or classes." Such discrimination may result from the deliberate intent to discriminate, or from "systematic or long-continued" action the reasonably foreseeable consequence of which is discrimination—here systematic and long-continued impairment of the voting power of a particular class of people, those who reside in a particular area of the State of New York. *See Snowden* v. *Hughes*, 321 U. S. 1, 7-10 (1944), and cases cited.

1. The New York method of legislative apportionment results in a substantial impairment of votes in each house of the legislature. No argument is needed to establish that the New York method of legislative apportionment results in a substantial impairment of votes. The voting power of a particular class of the population is substantially impaired in both the Assembly and the Senate, and in both the present apportionment and the pending apportionment based on the 1960 census.

In the Assembly, the third-class counties had 77% of the population, but only 65% of the members of the As-

sembly in the 1953 apportionment. In the pending apportionment this class of counties will have 80% of the population, compared with 67% of the assembly seats.

In the Senate, the class of 6%-or-more counties had 57% of the population, but only 47% of the senate seats in the 1953 apportionment. In the pending apportionment the population of this class, which has increased to 59% of the state's population in the 1960 census, will have its representation *reduced* to 46% of the senate seats.

The comparisons between population and legislative representation, standing alone, suffice to establish the substantial "impairment of votes." If more be needed, the percentages can be translated in numbers of people. In the pending apportionment, for example, the statistic that the 6%-or-more counties will be apportioned 46% of the Senate (26 seats) to represent 59% of the state's population means that the population of the rest of New York State would have to increase *by 4,628,000*, in order for its 31 senators to represent the same average population per district as is represented by the senators from the 6%-or-more counties.

Since appellants have also shown that, measured by other reasonable criteria, the impairment of votes in each house is substantial (see pp. 9-12, *supra;* Appellants' Brief pp. 31-37), they have proved at least a *prima facie* case of invidious discrimination in each house. *See, e.g., Davis* v. *Synhorst*, 217 F. Supp. 492, 497 (S.D. Iowa 1963); *Sincock* v. *Duffy*, *supra* at 189; *Moss* v. *Burkhart*, 207 F. Supp. 885, 891 (W.D. Okla. 1962). There is sound reason for this procedural rule requiring the state to justify the existence of substantial impairments of votes in a legislative appor-

tionment. As a practical matter, an apportionment which produces such results is effected in one of four ways: by a systematic classification which impairs the votes of those who live in a significant number of geographic units of representation; by a long-continued failure to reapportion despite unequal population growth or shifts among such units; by deliberate legislative intent to discriminate against a particular segment of the population; or by enactment of an apportionment which, although not systematically or deliberately discriminatory, is arbitrary and thus violates the standard of due process. Thus it is reasonable to presume *prima facie* the existence of the elements of invidious discrimination when substantial impairment of votes has been shown.

In this case, however, appellants have proved more, for they have clearly established systematic *and* long-continued discrimination in New York's method of apportionment.

2. The New York method of legislative apportionment discriminates intentionally against particular classes of people by impairing their votes. That the New York method of legislative apportionment has made an intentional discrimination, both systematic and long-continued, between classes of counties ("geographic classification"), based on their respective populations, is beyond argument.*

In the Senate the discrimination is against the population of the class of counties which each have 6% or more of the state's population (5 in the 1953 apportionment; 6

* In fact, Appellees Simon and Lefkowitz have stated: "We do not contend that the New York apportionment formula was intended to be based solely upon a population standard; the carefully prepared provisions of N. Y. CONST. Art. III §§ 2-5, are by no means an accident." Motion to Dismiss or Affirm at 20-21, *WMCA* v. *Simon*, October Term, 1962, No. 460.

in the pending apportionment) and in favor of the population of the class consisting of all other counties in the state.

In the Assembly the discrimination is against the population of the class of counties which each have 1⅓% or more of the state's population (12 in the 1953 apportionment, 14 in the pending apportionment) and in favor of the other two classes of counties created by the method of apportioning the Assembly, which together include all other counties in the state.

Discrimination is effected in the Senate by the "full-ratio" rule, see pp. 22-24, *supra*, and the rule requiring an increase in the number of senators, see pp. 24-27, *supra*; in the Assembly by the one-assemblyman-per-county rule, and, to a lesser extent, by the rule creating counties of the second class, see pp. 32-33, *supra*.

It is also beyond argument that to the extent that the method of apportioning the Senate discriminates against popular representation of Kings, New York and Bronx counties, as constituted in 1894, this discrimination was done with deliberate intent. This deliberate intent is apparent on the face of Article III of the constitution, which states three rules, all in the same paragraph (N. Y. CONST. Art. III §4, par. 2):

> (1) The rule that "* * * no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators"—there then being only two counties, New York and Kings, "separated by * * * public waters" which foreseeably could have been limited by the rule at that time.

(2) The rule that "no county shall have more than one-third of all the senators * * *." Again, at that time only New York and Kings foreseeably could have been limited thereby.

(3) The rule that "no county shall have four or more senators unless it shall have a full ratio for each senator" was aimed primarily at New York and Kings, the only two counties in this class in 1894.*

The debates in the 1894 constitutional convention also support this conclusion. See Appellants' Brief, Appendix C, pp. 134-37.

In short, appellants have proved all the elements of "invidious discrimination" under the rule stated by this Court in *WMCA* v. *Simon, supra,* unless something more by way of proof is required—as the court below held.

3. Appellants have proved "invidious discrimination" against the class of people whose votes are impaired in each house of the legislature. This is a case involving the rights of individuals—the right of a voter to cast his ballot and have it counted. *See Baker* v. *Carr, supra* at 208. Under the Equal Protection Clause, this Court has consistently applied a strict standard in testing the validity of state action when individual rights are involved. *NAACP* v. *Button,* 371 U. S. 415 (1963); *Sherbert* v. *Verner,* 374 U. S. 398 (1963); *compare Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), *with Hunter* v. *Pittsburgh,* 207 U. S. 161 (1907), *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942), *with William-*

* Erie County with a population between two and three constitutional ratios, is the only other arguable target of the "full-ratio" rule in 1894. The next most populous county, Monroe, had a population substantially less than two constitutional ratios. In practice, no county other than New York and Kings was adversely affected by the rule until the 1943 apportionment, when it deprived Queens of a seat.

son v. *Lee Optical*, 348 U. S. 483 (1955); *Brown* v. *Board of Education*, 347 U. S. 483 (1954), *with McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Griffin* v. *Illinois*, 351 U. S. 12 (1956), *with Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552 (1947); *see Morey* v. *Doud*, 354 U. S. 457, 471 (BLACK, *J.*, dissenting); *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, fn. 4 (1938) (including state legislation "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, * * *").

When the "basic civil rights of man" are invaded by state action, *Skinner* v. *Oklahoma*, *supra* at 541, the presumption of constitutionality which otherwise would attach to the state's action, *see Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911), is overcome. Once the discrimination is shown, the state has the burden of establishing that the discrimination is reasonable. *See, e.g., Griffin* v. *Illinois*, *supra*.

Any impairment of the vote, "a fundamental political right, became preservative of all rights," *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886), must be subject to the same strict constitutional standard that applies to state action which infringes on other individual rights. "It is a great privilege to chuse such persons, as are to bind a man's life and property by the laws they make." *Ashby* v. *White*, 2 *Ld. Ray.* 938, 958, 92 Eng. Rep. 126, 139 (House of Lords 1703) (HOLT, *C.J.*). *See South* v. *Peters*, 339 U. S. 276, 279 (1950) (DOUGLAS, *J.*, dissenting):

> "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government."

In short, the correct standard of proof is no greater than that required of plaintiff in determining the validity of state action affecting his individual rights—not the standard which the court below applied (see R. 307, 313).

Under the correct standard, appellants established at least a *prima facie* case when they proved that the New York method of legislative apportionment results in substantial impairment of votes, or, alternatively, that it discriminates against particular classes of people in the state by impairing their votes. *Cf. Neal* v. *Delaware*, 103 U. S. 370, 397 (1880) (*prima facie* violation of Fifteenth Amendment shown by fact that no Negro ever summoned as juror, although state's Negro population 17% of its total population). The burden to prove a reasonable basis for the state's action then shifted to appellees Simon and Lefkowitz. But they offered no proof (see R. 182-3), so that on the record appellants are entitled to judgment, unless in lieu of such proof, the stipulated facts and the facts of which the court below took judicial notice (see R. 296-97) constitute such a reasonable basis. For the reasons stated in the briefs of appellants and appellee Nickerson, such facts are plainly insufficient to afford a reasonable basis for the New York method of legislative apportionment, assuming such a defense is available.

4. No defense of justification is available to the State. The City contends:

> (a) The New York method of legislative apportionment is a *per se* violation of the Fourteenth Amendment; and, in any event,

Equal Protection Clause guarantees him in a state-wide election for its governor.

Gray v. *Sanders* holds the county-unit system of voting state-wide—which diluted the votes of the residents of the more populous counties—invalid under the Equal Protection Clause despite defendants' answer which alleged that the county-unit system was designed "to achieve a reasonable balance as between urban and rural electoral power." *Id.* at 370. *Gray* v. *Sanders* involved a state-wide vote for executive officers, but its holding must also apply to bar under any circumstances a county-unit system of voting for a legislative officer running in the state at large.

Gray v. *Sanders* states that the "inherent numerical inequality" of the electoral college required validation through inclusion in the Constitution and that, absent such validation, a state could not use "an analogous system" in a state-wide election, *Id.* at 378. The "inherent numerical inequality" of the electoral college is the same as that contained in the apportionment of members of Congress to the states, see U. S. Const. Art. II §1, par. 2. Does it not follow that this too required validation through inclusion in the Constitution? Absent such validation, a state cannot use a state-wide system for election of those who are to exercise its legislative power, if the apportionment of the members of the legislative body to the districts in the state contains "inherent numerical inequality." The individual's interest is the same as when he votes in a state-wide election: the protection of his right to participate on an equal basis with every other individual in choosing who is to exercise the power of state government.

In short, the state to the same extent is barred from showing a reasonable basis for departing from the principle

of equality of voting power in apportioning representatives in the state legislature. Any attempt by New York State to set up a geographical classification of voters which impairs the votes of a particular class of people in voting for the legislature must fall as an invidious discrimination in the enforcement of its fundamental law granting the right to vote. *Yick Wo* v. *Hopkins, supra; see Lassiter* v. *Northampton County Board of Elections, supra* at 50. If the State of New York chooses to protect a legitimate interest of the people of the less-populated counties of the state, it cannot do so by laws which are inconsistent with equality of voting power. *Gray* v. *Sanders, supra.*

5. **The protection for the interests of the people of the less-populated counties is otherwise adequate.** Despite the opinion below (R. 313), there is no basis for the conclusion that the population of the counties of New York State which now enjoy preferred status in voting for the legislature require such status in order to maintain "a proper diffusion of political initiative" in the state, *MacDougall* v. *Green, supra* at 284—in the sense of a proper political balance between their interests and the interests of the population of the class of counties which are now underrepresented in the legislature. Adequate means are available to the minority in making its political weight felt.

New York is a state in which either of the two major parties has a reasonable chance to win a state-wide election for governor. Its state-wide parties seek and require voter support from all parts of the state, rural as well as urban. Each major party represents an alliance of people who live in both of the geographic classifications established for each house by the New York method of legislative apportionment. In the case of the Republican Party, the predomi-

nantly Republican vote of upstate towns, villages and rural areas—roughly derived from the population of the areas now over-represented in the legislature—must be combined with at least a substantial minority Republican vote from the population of the areas now under-represented.* Contrast the political situation that might exist if there were only a "Country Party" and a "City Party," with the "Country Party" deriving significant voter support only

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* Using the geographic classification established for each house by the New York method of apportionment, the total vote for governor in the last three elections, 1954, 1958 and 1962, can be analyzed as follows:

(a) Based on 1953 apportionment:

	Total vote	Dem.-Lib. percentage	Rep. percentage
1954 (Harriman, Dem.-Lib., elected)			
Senate:			
6% or more counties	2,505,951	63.4%	36.6%
All other counties	2,604,400	37.3%	62.7%
Assembly:			
Third-class counties	3,844,569	55 %	45 %
All other counties	1,265,782	35 %	65 %
1958 (Rockefeller, Rep., elected)			
Senate:			
6% or more counties	2,644,608	55 %	45 %
All other counties	3,036,216	36 %	64 %
Assembly:			
Third-class counties	4,287,326	49 %	51 %
All other counties	1,393,498	34 %	66 %

(b) Based on pending apportionment:

1962 (Rockefeller, Rep., elected)			
Senate:			
6% or more counties	3,134,904	52 %	48 %
All other counties	2,499,101	37 %	63 %
Assembly:			
Third-class counties	4,431,207	48 %	52 %
All other counties	1,202,798	35 %	65 %

Sources: For 1954: 1956 N. Y. LEGIS. MAN. 1032-33 (1956)
For 1958: 1959 N. Y. LEGIS. MAN. 1060-61 (1959)
For 1962: N. Y. DEP'T STATE, GOVERNOR AND LIEUTENANT GOVERNOR—VOTE CAST ON NOVEMBER 6, 1962 (1963).

from the less-populated areas, and thus unable to win a state-wide election for governor.*

Thus "a proper diffusion of political initiative" would still be maintained, assuming the legislature were apportioned in a manner consistent with equality of voting power. A substantial state-wide victory for the Republican Party candidate for governor would still be likely to elect a Republican majority in both houses of the legislature. In that event, the machinery of government, the executive and the legislature, would still be controlled by a political party responsive to the interests of the population of the areas which are now over-represented in the legislature.

Other arguments to justify preferred voting status for the less-populated areas have even less merit.

The natural resources of the less-populated areas would seem to involve various interests common to different groups of people throughout the entire state—for example, the interest in economic exploitation, sound or unsound, and the interest in conservation for other purposes.

Similarly, many of the urgent problems of our day are not limited to the large metropolitan centers: for example, the problems of the non-white population, the problems of low-income families, inadequate housing and the increasing incidence of crime.**

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* For a discussion of state politics generally, see KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (3d ed. 1952); TRUMAN; THE GOVERNMENTAL PROCESS (1951).

** See, *e.g.*, UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, UNITED STATES CENSUS OF POPULATION, 1960 NEW YORK DETAILED CHARACTERISTICS Tables 133 and 134 (distribution of non-white population and per capita income); NEW YORK STATE DEPARTMENT OF COMMERCE, RESEARCH BULLETIN No. 3 10-11 (1962) (per capita income); NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, STATISTICAL SUMMARY OF PROGRAMS 3, 55, 58 (1962); *id.*, ANNUAL REPORT 1960-61 16-17 (1961) (distribution of stated-aided housing and urban renewal projects); NEW YORK STATE DEPARTMENT OF CORRECTION, RELEASE dated July 12, 1963, Table I, Arrests for Major Crimes, January-March 1963 and Calendar Year 1962.

The foregoing discussion highlights the danger of *a priori* assumptions about protection of the interests of the less-populated areas of New York State as a basis for departing from full equality of representation in the legislature—assuming that such a departure would ever be permissible under the Fourteenth Amendment.

B. The New York Method of Legislative Apportionment Results in an Arbitrary Impairment of Votes

Assuming *arguendo* that elements of arbitrariness or irrationality must be found in the New York method of legislative apportionment to invalidate it under the Fourteenth Amendment, such elements exist, comparable to those discussed by Mr. Justice CLARK in *Baker* v. *Carr*.

In New York State a "wide vertical disparity" exists between the representation of the more populous and less populous counties of the state, in both houses of the legislature. See pp. 9-12, *supra*. On its face, according to Mr. Justice CLARK, such a disparity constitutes a violation of the Equal Protection Clause unless a state of facts reasonably can be conceived to justify it. *Baker* v. *Carr*, *supra* at 253, 256.

An examination of the 1953 apportionment and the pending apportionment based on the 1960 census, however, discloses no reasonable justification for the New York method of legislative apportionment.

1. The 1894 method of legislative apportionment is obsolete. It is arbitrary and irrational to continue to apply in the second half of the Twentieth Century a method of legislative apportionment devised in 1894—69 years ago—when it consistently produces the results noted: a substantial impairment of the majority's voting power in both houses of the legislature. Even assuming that a "rational"

basis once existed, it has disappeared because of changed circumstances.

The population of New York State has increased from less than 6 million in 1894 to over 16 million in 1960. The figure which determines a county's classification in a senate apportionment, 6% of the state's population, was about 350,000 in 1894; today it is almost 1,000,000. An assembly ratio (population of the state÷150) was 38,606 in 1894; it is now 108,272. Today the population of New York City alone far exceeds the total population of the state in 1894.

Since 1894 the state's population pattern has developed in a manner not foreseen by the 1894 convention. The convention foresaw that New York and Kings would be the two counties of maximum population,* and that either of these counties might grow in population in proportion to the rest of the state at such a rate that either one would have more than one-third of all the senators (in the 1894 apportionment New York had 24% and Kings 14%) and that together they would have more than one-half of all the senators. To prevent this, the convention wrote two prohibitions into the constitution. See N. Y. Const. Art. III §4, par. 2; see pp. 42-43, *supra*.

What has actually occurred, however, was plainly not foreseen by the 1894 convention. In subsequent apportionments the populations of Kings County and New York County (plus Bronx since 1914) increased only slightly in proportion to the rest of the state, at nothing like the rate

* In 1894 the City of New York comprised only New York County (the island of Manhattan plus part of present Bronx County). Kings County was the City of Brooklyn. The Greater New York Charter, N. Y. Laws 1897, c. 378, united the City and County of New York, the City of Brooklyn and the County of Kings, Richmond County and part of what was then Queens County: the City of Long Island City, the Towns of Newtown, Flushing and Jamaica, and part of the Town of Hempstead.

necessary to cause either of the constitutional prohibitions to apply. And, according to the federal census, between 1950 and 1960 the populations of these three counties actually declined, while the population of the rest of the state increased. Today the percentage of the state's population concentrated in New York, Bronx and Kings counties (34%) is well below what it was in 1894 (40%).*

Moreover, the counties of maximum population now include Queens and Nassau, a development certainly not foreseen by the 1894 convention. At that time Queens, including the territory which in 1899 became Nassau, had a population of only 123,974. The present extreme dilution of popular representation caused by the rule requiring an increase in the total number of senators is attributable to the phenomenal population growth of these two counties, Queens beginning after the First World War and Nassau after World War II. See 1962-63 N. Y. LEGIS. MAN. 1079-80 (1962); see pp. 26-27, *supra*.

	Population		
1894				
	Kings	868,983		
	New York	1,423,984		
		2,292,967		
	State	5,790,865	=	40%
1960				
	Kings	2,518,510		
	New York	1,584,069		
	Bronx	1,368,207		
		5,470,786		
	State	16,240,786	=	34%

Population trends not foreseeable in 1894 have caused the disparity between the populations of the least populous counties and the most populous counties to increase steadily. As a consequence, use of the method of legislative apportionment required by the 1894 constitution has produced a dilution of the representation of the most populous counties and an inflation of the representation of the minority far in excess of what was reasonably foreseeable at the time this method was adopted.

In 1894 the population of New York State was much more evenly distributed among the counties. In the 1894 apportionment, for example, the first-class (one assemblyman) counties were apportioned only two assembly seats more than was commensurate with their share of the state's population, because only 21 had less than one ratio—the state-wide average population per assembly district—while 15 had unrepresented population remainders, that is, remainders less than one-half a ratio. In the pending apportionment, there will be 38 one-assemblyman counties with less than one ratio of population, and only 6 with unrepresented population remainders. As a result, the first-class counties as a group will receive 18 more assemblymen than they would be entitled to receive on the basis of population (see R. 235).

Since 1894 the average population of the first-class counties—those with only one assemblyman—has steadily declined in comparison to the average population per assemblyman in the third-class counties:

Apportionment	Average Population of Assembly Districts of Third Class Counties	Average Population of First Class Counties (one Assemblyman)	Difference
1894	40,733	36,010	4,723
1907	50,657	41,602	9,055
1917	60,998	41,424	19,574
1943	97,366	52,187	45,179
1953	112,477	57,648	54,829
pending	126,649	62,765	63,884

Source: WELLS, LEGISLATIVE REPRESENTATION IN NEW YORK STATE 12 (1963 ed.).

In the 1894 apportionment the third-class counties (those with 1⅓% or more of the state's population) had 68% of the state's population and 64% of the assembly seats. In the pending apportionment they will have 80% of the state's population, but only 67% of the Assembly.

In the 1894 apportionment the counties with 6% or more of the state's population had 40% of the state's population and 38% of the senate seats. In the pending apportionment, they will have 59% of the state's population, but only 46% of the senate seats.

Given the present population distribution in the state and the likely future trends,* these results cannot reasonably be attributed to a "rational" system of legislative apportionment.

Finally, to stress the obvious, the constitution of 1894 was adopted before the advent of major improvements in transportation and communication, which undermine what-

* See REGIONAL PLAN ASSOCIATION, BULLETIN 100, SPREAD CITY 34-36 (1962).

ever validity there may once have been in the arguments at the 1894 convention in favor of limiting the size of legislative districts. Super-highways, the airplane and the helicopter, television, radio and business machines—all unheard of in 1894—are available today for campaigning and serving the electorate.

2. The New York method of legislative apportionment produces arbitrary and irrational variations between representation and population. Like the Tennessee apportionment, the New York apportionment produces arbitrary and irrational variations between legislative representation and population.*

In the Assembly:

(a) *Counties of equivalent population with different representation.* In the Assembly, several one-assemblyman counties have populations far above the state-wide average yet receive the same representation as counties with a much smaller population. At the same time, other counties with slightly larger populations receive *two* assemblymen, because they happen to be counties of the second class (populations between 1% and 1⅓% of the state's population).

In the pending apportionment, for example, the state-wide average will be 108,272 per assemblyman. Four first-class counties have populations well above this average:

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* Appendix B shows the "total representation" of the counties of New York State, in accordance with the method used by Mr. Justice CLARK in *Baker* v. *Carr*, *see* 369 U. S. at 255, in the pending apportionment based on the 1960 census figures.

County	Population
Schenectady	150,688
Chautauqua	143,832
Rensselaer	140,933
Rockland	131,834

Each of these counties, however, will be apportioned only one assemblyman. Yet in the same apportionment 26 other counties each will receive one assemblyman, although none has a population over 57,000, and the least populous, Schuyler has a population of only 14,974. Furthermore, three other counties, each with a larger but equivalent population, will receive two assemblymen apiece as counties of the second class:

County	Population	Average Population per Assemblyman
Broome	209,598	104,799
Orange	179,874	89,937
Dutchess	171,396	85,698

(b) *The rule prohibiting an assembly district which crosses a senate district boundary.* Arbitrary and irrational variations between voting representation and population also result from a mandatory rule in the constitution:

> "In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, exclud-

ing aliens, as the case may require." N. Y. CONST. Art. III §5, par. 4.

In substance, the constitution prohibits the simple expedient of drawing assembly district lines within a county so as to create districts of equal population, without regard to the senate district lines within the county. As a result, in the 1953 apportionment assembly districts within the counties of Kings, New York, Queens, Erie and Onondaga varied substantially in population (see R. 236). Two of Onondaga's three assembly districts each had a population of about 84,000, while one assembly district had the same boundaries as one of the two senate districts in the county. This district had a population of 167,226, double that of each other two, making it by far the most populous in the state. Elsewhere the population variations between assembly districts in the same county were about 50,000 in the 1953 apportionment:

County	Population per Assembly District*	
Kings	10 districts:	144,177
	12 districts:	96,118
New York	4 districts:	149,643
	12 districts:	99,762
Queens	4 districts:	148,421
	9 districts:	98,947
Erie	2 districts:	146,417
	6 districts:	97,611

* Population in a particular district will vary slightly because of the rule against dividing a block.

In the pending apportionment, this provision will result in creation of assembly districts of disparate population within seven counties, Bronx, Kings, Queens, Erie, Monroe, Nassau and Suffolk, with some districts having popula-

tions ranging from about 142,000 to 190,000—far above the state-wide average of about 108,000 per district (see R. 237). Monroe will show the extreme variance. It will have one assembly district with the same boundaries as a senate district and a population of about 190,000, twice the population of each of its other four districts—merely because 5, the number of assemblymen Monroe will have, is not divisible by 3, the number of its senators. In the other counties that will be affected by this rule*, the range of population variation between assembly districts in the same county will be 34,000 to 60,000.**

(c) *The inconsistent combination of Fulton and Hamilton counties into one assembly district.* A final example

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* Like Monroe, Suffolk will also be apportioned 5 assemblymen and 3 senators. However, its most populous district will be reduced because of the rules against dividing towns. N. Y. CONST. Art. III § 4, par. 1, § 5, par. 4.

**

County	Population per Assembly District	
Bronx	4 districts:	171,026
	6 districts:	114,017
Kings	4 districts:	179,894
	15 districts:	119,929
Queens	4 districts:	173,308
	9 districts:	115,539
Erie	2 districts:	173,275
	6 districts:	115,516
Nassau	6 districts:	141,756
	4 districts:	106,317

Note: Population of a particular district will vary slightly because of the rule against dividing a block. Population of Nassau County's districts will also vary because of the rules against dividing towns.

from the Assembly of counties with equivalent populations but different representation is the arbitrary exception of Fulton and Hamilton counties from the rule which requires that each county be apportioned one assemblyman, regardless of its population. The constitution directs that Fulton and Hamilton counties be combined into one assembly district, and in the 1953 apportionment one assemblyman was apportioned to this district for a total population of 54,190 (Fulton 50,135; Hamilton 4,055). Yet in the same apportionment there were 25 counties each of which received one assemblyman apiece although each had a population less than that of Fulton and Hamilton combined, and combinations of several of them would have produced assembly districts of equivalent populations. For example, the following sparsely-populated counties are contiguous and could have been combined into single districts with populations less than the state-wide average per district (95,000):

County	Population per County	Total Population of Hypothetical Assembly District
Schuyler	14,066	
Seneca	28,254	59,781
Yates	17,461	
(or any 2 of them)		
Greene	28,082	50,300
Schoharie	22,218	
Essex	34,542	73,219
Warren	38,677	
Chenango	38,741	75,527
Cortland	36,786	
Livingston	39,692	75,750
Wyoming	32,275	
Delaware	43,863	83,222
Sullivan	39,359	

The same is true in the pending apportionment. Twenty-four one-assemblyman counties will each have a population less than that of Fulton and Hamilton combined and the same combinations of counties can be made, all to produce a population per district well below the state-wide average and in three instances, less than the population of the Fulton-Hamilton district.

In the Senate:

As already pointed out (see Subhead *A*, p. 39 *et seq.* *supra*), the method of apportioning the Senate is "rational" only in the sense that it shows a deliberate pattern to reduce the popular representation of the class of counties which each have 6% or more of the state's population and to increase the representation of the population of the remaining counties. Senators are apportioned to the two classes of counties in different ways, with the "full-ratio" rule and the rule requiring an increase in the number of senators providing the means of discriminating against popular representation of the counties in the 6%-or-more class.

This intentional method of discriminatory apportionment, however, contains a number of arbitrary and irrational elements.

(a) *Variation in representation among urban counties.* The two-class method of apportioning the Senate does not result in a "rational" pattern whereby the representation of the predominantly urban counties of the state is reduced in order to give a greater voice to the sparsely-populated predominantly rural counties. Instead, the limitation on representation of the counties with 6% or more of the state's

population simply means that a few heavily-populated urban counties, most of them within the City of New York, are discriminated against in favor of the other predominantly urban counties, as well as all the predominantly rural counties. The separate classification for the 6% or more counties cannot be explained as a rational attempt to adjust the urban-rural population imbalance.

The most authoritative classification to identify by political unit boundaries the major urban centers throughout the United States is the "Standard Metropolitan Statistical Areas" (SMSA's) established by the United States Bureau of the Budget (see R. 41-45). An SMSA is a county or group of contiguous counties which satisfies detailed criteria designed to distinguish predominantly urban areas from predominantly rural areas. *Ibid.* Using these criteria, the 1960 federal census identifies seven areas in New York State as SMSA's (R. 48):

SMSA	Counties
1. *New York* population: 10,260,557	
City of New York:	
	Bronx
	Kings
	New York
	Queens
	Richmond
outside City of New York:	
	Nassau
	Rockland
	Suffolk
	Westchester
2. *Albany—Schenectady—Troy* population: 648,843	
	Albany
	Rensselaer
	Saratoga
	Schenectady
3. *Utica—Rome* population: 324,548	
	Herkimer
	Oneida
4. *Syracuse* population: 554,388	
	Madison
	Onondaga
	Oswego
5. *Binghamton* population: 209,597	
	Broome
6. *Rochester* population: 571,029	
	Monroe
7. *Buffalo* population: 1,275,325	
	Erie
	Niagara

Thus 22 of the state's 62 counties are included within its seven SMSA's and constitute the urban counties of the state, by the most authoritative classification available. In

the pending apportionment, however, only six of these 22 will be in the class of counties which each have 6% or more of the state's population: Bronx, Kings, New York, Queens, Nassau and Erie. Five of these—all but Erie—are within the New York SMSA. The remaining 16 urban counties are apportioned senate representation as members of the same favored class of counties which includes all the predominantly rural counties.*

Using the SMSA classification, the senate representation to be apportioned to the 22 urban counties varies widely, depending primarily on whether the county has 6% or more of the state's population. For example, Erie, Monroe, Nassau, Suffolk and Westchester, all urban counties, will each be apportioned three senators in the pending apportionment:

County	Population	Average Population per Senator
Nassau	1,275,801	425,267
Erie	1,039,648	346,549
Westchester	782,179	260,726
Suffolk	650,112	216,704
Monroe	571,029	190,343

State-wide average per senator = 284,926

* A closer correlation exists in the Assembly between the 22 urban counties in the SMSA classification and the third-class counties, whose popular representation is limited by the method of assembly apportionment. Based on the 1960 census the 22 urban counties include all 14 third-class counties plus one second-class county (Broome) and seven first-class counties (Herkimer, Madison, Oswego, Rensselaer, Rockland, Saratoga and Schenectady). This closer correlation, of course, is attributable to the lower population requirement for a third-class county in the Assembly: 1⅓% of the state's population, against 6% in the Senate. This is still far from a rational correlation between urban character and population.

The only reason why two of them, Erie and Nassau, have much larger populations per senator is that they happen to fall into the class of counties which each have 6% or more of the state's population.

To reiterate, this discrimination between the two classes of counties for senate apportionment purposes is not based on whether a county is predominantly urban or rural in character, or on other arguably valid factors. Instead, the discrimination is mechanical: It depends solely on the number of people residing in the county, as a percentage of the state's population—a percentage originally determined simply in order to limit the representation of New York and Kings counties.

A predominantly urban county like Nassau was not under-represented in the Senate until its population increased to 6% of the state's total. At that point it becomes the most under-represented county in the state. In the 1953 apportionment its average population per senate district was 218,563 against the state-wide average of 244,887; in the pending apportionment its average population per senate district will be 425,267 against the state-wide average of 284,926. Between 1950 and 1960 Nassau's population almost doubled--from 655,690 to 1,275,801--*yet its senate representation will not increase at all.*

In short, the sole criterion for discriminating against the 6%-or-more counties in senate representation is an arbitrary population measure, completely unrelated to any consideration which arguably might justify the discrimination.

(b) *Increasing the representation of the less populated counties as the more populated counties increase in popu-*

lation. An arbitrary and irrational rule in the New York constitution is that which requires that in each apportionment the total number of senators be increased to the extent that any county having 6% or more of the state's population becomes entitled to a greater number of senators than it had in the 1894 apportionment (see pp. 24-27, *supra*), with all the increase to be apportioned to the counties which have less than 6% of the state's population.

In the first place, the arithmetic result is that the comparative voting power of the population of the counties with 6% or more of the state's population *decreases* as their share of the state's population *increases*, and conversely, the comparative voting power of the population of the remaining counties *increases* as their share of the state's population *decreases*. In the apportionment of 1894 the two 6%-or-more counties, Kings and New York, had 40% of the state's population and 38% (19) of the 50 seats in the Senate. In subsequent apportionments the gap between population and representation has steadily widened. By the 1953 apportionment the five 6%-or-more counties had 57% of the state's population and only 47% (27) of the 58 senate seats. In the pending apportionment, the six 6%-or-more counties have 59% of the population—and will be apportioned only 46% (26) of a 57-member Senate. Despite an increase of almost 1,400,000 in the total population of the 6%-or-more counties between 1950 and 1960, their representation in the Senate will *decrease*, both in actual number of seats and percentage of the state total.

In the second place, there is nothing sacred about the year 1894. It is irrational to impose meaningless standards, even though they derive from the 1894 apportionment. The distribution of population throughout New York State was

radically different in 1894 from what it is today. The population increase from less than 6,000,000 to over 16,000,000 has inevitably resulted in a steady increase in the number of 6%-or-more counties.

The rule for increasing the number of senators is arbitrary and irrational and is nothing more than a "grandfather clause," a device whereby a temporary majority in 1894 has sought, so far successfully, to perpetuate its control of the Senate indefinitely. *Cf. Lane* v. *Wilson*, 307 U. S. 268 (1939); *Guinn* v. *United States*, 238 U. S. 347 (1915).

The justifications for the rule advanced in Judge Levet's opinion have no merit. Said Judge Levet: "Unless senatorial districts are to be subject to repeated and relatively frequent readjustments, some practicable means of addition of more senators must be provided" (R. 307). In fact, senate districts *have* been subject to "repeated and relatively frequent readjustments." This has been due primarily to population changes within the state and to the steady increase in the total number of senators, with a corresponding decrease in the size of the second ratio of population relative to the state's total population. Regrouping of the counties in the multi-county senate districts has been compelled in each apportionment in order to give such districts the equality of population required by the constitution. Only four of the original 50 senate districts of 1894 still have the same boundaries.* In the first apportionment after 1894—in 1907—the boundaries of 16 of the

* Columbia, Dutchess and Putnam Counties (24th Senate District in 1894, now 35th S.D.); Albany County (29th S.D. in 1894; now 30th S.D.); Oneida County (34th S.D. in 1894; now 42d); and Chautauqua and Cattaraugus counties (50th S.D. in 1894; now 55th).

28 second-ratio senate districts were changed. A substantial number of second-ratio senate districts have been shifted on each subsequent apportionment. In the 1953 apportionment 12 of 31 were changed.

To illustrate, every one of the predominantly urban counties in the seven standard metropolitan statistical areas in the state (see pp. 64-65, *supra*) which does not have at least one senator of its own, is linked with a predominantly rural county or counties, rather than with another urban county in the same SMSA. The Albany-Schenectady-Troy SMSA consists of four urban counties: Albany, Rensselaer, Saratoga and Schenectady. In the 1953 apportionment, Albany received a senator of its own, Rensselaer was in a senate district with Washington County, Saratoga in a district with Essex and Warren, and Schenectady in a district with Schoharie, all predominantly rural counties. In the 1943 apportionment, the combinations of counties were entirely different: Rensselaer and Saratoga were in one district, Schenectady was in a district with Montgomery County and Essex, Warren and Washington were joined with Clinton.

Another justification for the rule requiring an increase in the number of senators is stated in the opinion below to be "to prevent counties having three or more senators from obtaining a larger number of senators at the expense of the counties of the State not having three or more senators," this statement being quoted from *Matter of Dowling, supra* at 51, where this was said to be "the one, and only one purpose" of the rule (R. 307). The City agrees that this is the sole purpose of the rule, but it is no justification for it under the Fourteenth Amendment. Moreover, as already pointed out, the rule in operation does much more.

The proportionate representation of the counties with less than 6% (three constitutional ratios) of the state's population has not remained constant since 1894. It has increased steadily, an increase accelerated by the failure to reduce the total number of senators when a county having 6% or more of the state's population has decreased in representation since the 1894 apportionment. See p. 27, *supra*.

Finally the opinion below states that the rule was "designed to effectuate administration of the senatorial electorate, and designed to meet accessibility, and practicability" (R. 307). There is nothing in the record to support this statement, assuming it were a justification. The record amply supports the statement of the New York Court of Appeals in *Matter of Dowling* that the one and only purpose of the rule was in effect to discriminate against senate representation of the class of counties, each of which has 6% or more of the state's population.

(c) *The random impact of the "full-ratio" rule.* The "full-ratio" rule bars a county which has 6% or more of the state's population from receiving an additional senator for any remainder in population which is less than a full constitutional ratio, however large this remainder may be (see pp. 22-24, *supra*).

The rule is irrational because its impact in an apportionment of the Senate is completely accidental and arbitrary.

As previously discussed, the effect of the rule in reducing the senate representation of a 6%-or-more county can be severe. This is due to both the rule itself and the fact that the ratio of population used in apportioning the Senate is artificially inflated by the rule requiring

an increase in the number of senators: the constitutional ratio, based on a 50-seat senate, is substantially greater than the ratio determined by dividing the state's population by the actual number of senators to be apportioned. The severity of the rule's impact is also due to the fact that the population of New York State is so large today. A constitutional ratio of population in turn is large (324,816 based on 1960 census), so that a rule which bars representation to population remainders can and does affect a great many people.

Theoretically, all the 6%-or-more counties can find the senate representation very substantially limited by the "full-ratio" rule, or it can have no adverse effect on their representation. The impact of the rule depends entirely on what the population figures may show in a particular census. If a 6%-or-more county happens to end up with a remainder of population just under a full constitutional ratio, as happened to Bronx County in the 1953 apportionment and as will happen to Nassau County and New York County in the pending apportionment, the legislature has no discretion to adjust this arbitrary and unfair result. The constitution recognizes no exception. In the case of Nassau, for example, its unrepresented remainder of 301,353 will be substantially greater than the state-wide average population per senator (284, 926) and almost double the population of the probable least populous senate district. Yet in apportioning senators to Nassau the legislature's hands will be tied; no discretion exists to correct the inequity. By contrast, the legislature has discretion—and exercises it—in apportioning senators to the remaining counties using the second ratio of population. In both the 1943 and 1953 apportionments, neither Broome nor Richmond had a full second

ratio of population, although in each case the population of the county almost reached that figure. Nevertheless, each was apportioned a senator of its own. Similarly, in the 1953 apportionment Onondaga received two senators for 1.71 second ratios of population; in the pending apportionment Monroe will receive three senators for its 2.63 second ratios.

Finally, nothing except the law of probabilities prevents the "full-ratio" rule from having a severe impact on the popular representation of every one of the counties with 6% or more of the state's population in any particular apportionment. In the pending apportionment, for example, a population shift of a mere 68,944 (less than ½ of 1% of the state total) from Bronx to Queens would have caused the "full-ratio" rule to deprive both of them of a senator, as well as Kings, New York and Nassau, each of which already must be denied an additional senator.

In short—assuming irrationality must be shown—in a matter which so vitally concerns the rights of an individual, his right to vote, it is irrational for a state to employ a rule to limit popular representation in voting for the legislature which is not reasonably related to this objective, but which instead operates and can operate in an arbitrary and capricious manner.

POINT II

The majority has no practical opportunity to change the New York method of legislative apportionment.

In *Baker* v. *Carr* Mr. Justice CLARK adopted a threshold test for determining whether a Court should intervene to correct an invidious discrimination resulting from legislative apportionment: whether or not the majority of the people have practical opportunities to correct the situation by exerting their political weight at the polls. *See Baker* v. *Carr, supra* at 258-59. He concluded that the majority of the voters of Tennessee had no practical opportunity to correct the situation. The City contends that the majority of the people of New York are in the same helpless position.

Like Tennessee, New York has no procedure for amending the state constitution by initiative and referendum. Recurrent efforts to amend the constitution to provide this procedure have all been in vain. See, *e.g.*, NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, AMENDMENTS PROPOSED TO NEW YORK CONSTITUTION 1895-1937 1224-28 (1938), and the following bills introduced in the 1963 session of the state legislature, all of which died in committee: S. Int. No. 763, 1136; Ass. Int. No. 1783, 2081.

Like Tennessee, procedures exist in New York for taking corrective action, but these procedures must be initiated by the minority-dominated legislature. The votes of the incumbent legislators, as Mr. Justice CLARK recognized, can be expected to prevent any change in the status quo. *Baker* v. *Carr, supra* at 259.

The New York constitution, which prescribes the method of legislative apportionment, can be amended in only two ways, one of which is by vote of the people at general election *after* the proposed amendment has been approved by a majority of the members of each house of the legislature at two successive regular sessions, a general election of the legislature having intervened. See N. Y. Const. Art. XIX §1. This way patently offers no practical opportunity for the majority to effect a change in legislative apportionment, and in fact has not in New York. In 1955, for example, the then governor, Averell Harriman, in his first annual message to the legislature recommended the initiation of a constitutional amendment to "remedy the injustices of our present apportionment system," 1955 N. Y. Sess. Laws 1577-78. He repeated this recommendation in each succeeding year of his administration. See 1956 N. Y. Sess. Laws 1524 (annual message), 1632-33 (special message); 1957 N. Y. Sess. Laws 1730 (annual message); 1958 N. Y. Sess. Laws 1819-20 (annual message). The legislature did not act, despite the fact that as far back as 1950 a report to its joint legislative committee on reapportionment had concluded that: "The cities, particularly the City of New York, do not have equitable representation in either House" and that the present method of obtaining the ratio of population for apportioning senators is "unfair to urban districts." See *Preliminary Report to the Joint Legislative Committee on Reapportionment*, N. Y. Legis. Doc. No. 31 44, 12 (1950).

Apart from action which must be initiated by the legislature, the only way the New York constitution can be amended is by vote of the people *after* the proposed amend-

ment has been adopted by a constitutional convention, N. Y. Const. Art. XIX § 2; *cf. id.* § 3. The only way a convention can be held is if a majority of the people voting thereon vote "yes" on the question "shall there be a convention to revise the constitution and amend the same?" *Id.* § 2. This referendum in turn can be presented to the voters in only two ways:

> (1) at such times as the legislature may by law provide—again not a practical opportunity for the majority of the people in a minority-dominated legislature; and
>
> (2) *Once every twenty years at a general election, the next time being in 1977.*

The latter alternative—an automatic referendum every 20 years—offers the only factual distinction between the position of the majority in Tennessee and in New York.

The court below seized on this distinction and held that the majority has a political remedy available to it, because this automatic referendum procedure exists and because on November 5, 1957, the last time the referendum was held, a majority of those voting on the question voted "no" (See R. 304, 311-12, 314; *cf.* R. 296-97).

At the outset, it is axiomatic that a majority of the people of a state, however large that majority may be, cannot by approving a state's action render it immune from attack under the Fourteenth Amendment, if such action otherwise violates an individual's rights. And the City does not concede that persuasive reasons would exist for modifying or withholding judicial action, even if an initiative and referendum procedure for amending the state constitution

were available to the majority at reasonably frequent intervals.

Assuming *arguendo* this were the case, however, the only procedure which does exist—the automatic vote once every twenty years on whether to hold a convention—plainly falls far short of any reasonable standard for a political remedy available to the majority.

Since there is no general initiative and referendum procedure in New York, the majority has no control of the question to be voted on. The question which is voted on—whether or not to hold a convention—if voted on favorably, represents only the first step. A vote to hold a convention is no assurance that it will act, even if there were no impairment of votes in electing convention delegates. And the majority is assured of an opportunity to vote only once every 20 years.

Despite Judge Levet's opinion, the 1957 vote against holding a convention cannot reasonably be interpreted as an expression of the majority on "the issue of apportionment" (R. 311). The question was: "Shall there be a convention to revise the constitution and amend the same?" As worded, the question has no relation whatsoever to legislative apportionment. Judge Levet's opinion leaped this hurdle by equating the referendum on holding the convention, despite its plain language, with a referendum on the issue of apportionment. Judge Levet concluded that the vote was "heralded as an issue of apportionment" (*ibid*), and, therefore, the vote against holding the convention was in effect a vote approving the present method of apportionment, or, in the alternative, "the majority chose not to

convene a constitutional convention" (*ibid*), and thus did not avail itself of the opportunity to disapprove the present method of apportionment by voting "yes" on the question.

Judge Levet based this conclusion on the 1957 vote on the question. This vote was "yes" 1,242,568 (23.8%), "no" 1,368,063 (26.2%), *blank and void 2,608,204 (49.96%)*—a statistic not mentioned in the opinion. See 1958 N. Y. LEGIS. MAN. 1077-78 (1958). Just under one-half the voters who went to the polls expressed no opinion on the question; those who expressed no opinion far outnumbered those who voted "no". This may in part have resulted from voter confusion: included on the ballot with the question of holding the convention were six proposed amendments to the constitution. (See Appendix C, a facsimile of the face of the voting machine used in a part of New York County on November 5, 1957.) Moreover, the voters who voted in the general election of 1957 represented only 81% of the voters registered to vote, see *id.* at 1056, the low turnout probably being due to the fact that no state-wide office was contested. By contrast, 93% of registered voters voted for president in 1956. See 1957 N. Y. LEGIS. MAN. 1032-33, 1042-43 (1957). In short, the 1957 vote on whether to hold a convention is not a reasonable basis for the conclusion that the majority exercised a choice.

Furthermore, the vote was not the equivalent of a referendum on the issue of apportionment, despite Judge Levet's conclusion that it was "heralded as an issue of apportionment" (R. 311). The only "herald" identified by Judge Levet is the then governor of the state, Averell Harriman, on the basis of reports in the *New York Times*

of three public statements which the governor made in September and October of 1957 (See R. 311-12).

It would seem beyond dispute that no weight should be given to anyone's opinion, however authoritative, as to the issue actually presented by a question being voted on in an election, at least when the question as worded has a plain meaning and when the interpretation offered bears no reasonable relationship to the plain meaning of the question. *A fortiori* this must be true when the issue is the right of a voter to equality of voting power, and the argument made to justify the impairment of his vote is that a majority has approved—or has had an opportunity to disapprove—the method of legislative apportionment which produced the impairment. *See Thigpen* v. *Meyers*, 211 F. Supp. 826, 832 (W. D. Wash. 1962), *appeal pending sub nom. Meyers* v. *Thigpen*, No. 381, Oct. Term, 1963; *Davis* v. *Synhorst*, 217 F. Supp. 492, 501 (S.D. Iowa 1963).

In addition, the public statements of Governor Harriman cited by Judge Levet do not support his conclusion. Only three are cited:

(1) The first was in a speech at a luncheon in a New York City hotel attended by about 1,000 college instructors and experts in government. N. Y. Times, Sept. 7, 1957, p. 1, col. 8. The luncheon was a part of the program of the annual meeting of the American Political Science Association. Governor Harriman urged residents of the state to vote in November for a convention to revise the state constitution, the headline of the article being "Harriman Urges Charter Reform." To quote from the *Times'* report:

> "The most important reform needed, the Governor said, is to elect one house of the Legislature on the basis of population to give big cities fuller representation."

While "the most important reform" needed was a change in the method of apportioning one house, Governor Harriman mentioned others as well:

> " 'Among the amendments needed to give the people a greater voice in their government,' Mr. Harriman said, 'are a provision for initiating constitutional amendments by public petition and a direct primary for nomination of statewide officers. * * * ' "

(2) The second statement cited by Judge Levet was in an article discussing the report of a conference on metropolitan area problems. See N. Y. Times, Sept. 24, 1957, p. 29, col. 1. The reference to Governor Harriman's views on the convention reads in full as follows:

> "The full conference accepted the view made public on Saturday by Governor Harriman that city and suburban dwellers were not adequately represented in the legislatures of most states. The conference, agreeing this was because reapportionment lagged behind population shifts, called for fairer systems of representation.
>
> "*Governor Harriman said later that if New York voters indicated their desire, in this year's referendum, for a Constitutional Convention, he would make reapportionment an item of the convention.*
>
> "Mr. Harriman favors electing one house of the Legislature strictly on a population basis with seats on the other chamber filled on a geographical district basis as heretofore." (emphasis added)

Chairman, *id.* Oct. 13, 1957, p. 47, col. 1, and Robert K. Christenberry, then the Republican candidate for Mayor of New York City, *id.* October 20, 1957, p. 69, col. 4. Both the Speaker of the Assembly, Oswald D. Heck, and the Majority Leader of the Senate, Walter J. Mahoney, opposed holding a convention, Speaker Heck on the ground that any necessary changes could be made as well or better by the legislature. See *id.* Sept. 21, 1957, p. 11, col. 7 (Heck); Sept. 19, 1957, p. 19, col. 2-3 (Mahoney). According to the *Times*, Speaker Heck's opposition reflected, in part, fears of upstate conservationists that a convention might bring about relaxation of constitutional provisions relating to the state's forest preserve.

Other public figures supported a convention on grounds unrelated to apportionment. Senator Jacob K. Javits stated:

> "• • • a convention could act very effectively in simplifying the constitution and in dealing with the question of court reform, which is an extremely important question." *Id.* Nov. 1, 1957, p. 16, col. 2.

The deans of all ten New York State law schools endorsed the convention as a method of revising the constitution that "permits the kind of study, debate and action which considers the entire Constitution and the inter-relation of its parts as political, social and economic conditions change," *id.* Oct. 10, 1957, p. 36, col. 7. They expressed the hope that it would consider "the possibility of simplification of a very unwieldy and bulky document." *Ibid.* Harold Reigelman, Republican candidate for Mayor of New York City in 1953, also urged support:

> "Opposition to a convention, he added, 'is based upon a distrust of the judgment of the people and

> the fear by some political or private interests that the exercise of that judgment may cost them some controversial constitutional advantage they presently enjoy.'" *Id.* Nov. 1, 1957, p. 16, col. 3.

Thomas J. Curran, New York County Republican leader, joined with Mr. Reigelman in urging a "yes" vote. *Id.* p. 1, col. 1.

A number of non-political organizations took positions for or against, none of them giving apportionment as a reason. These included:

Against: Uniformed Firemen's Association, *id.* Oct. 31, 1957, p. 64, col. 6; New York Real Estate Board, *id.* Nov. 1, 1957, p. 16, col. 2; New York Chamber of Commerce, *id.* Sept. 30, 1957, p. 17, col. 1.

For: Citizens Union, *ibid;* Brooklyn Bar Association, *id.* Oct. 28, 1957, p. 25, col. 3; Automobile Club of New York, *id.* Oct. 1, 1957, p. 36, col. 8.

Finally, Judge Levet stated that if a convention had been held, the majority would have been afforded a practical opportunity to change the present method of apportionment. Delegates to a convention, however, are elected 3 per senate district, plus 15 delegates elected at large. N. Y. Const. Art. XIX §2. Thus, the same discrimination as exists in the Senate against popular representation of each of the counties which has 6% or more of the state's population also exists in electing delegates. The five 6%-or-more counties with 57% of the state's population would have been able to elect only 81 of the 174 district delegates and at best a narrow majority of all the delegates, 96 (81 plus the 15 delegates at large)

out of 189. Standing alone, such an impairment of the majority's voting power must disqualify this procedure as a political remedy.

A fortiori such disqualification applies for the future. The next opportunity to elect delegates is in 1978, if the vote in 1977 is to hold a convention. The probability is that by 1978 the population of the counties having 6% or more of the state's population will be unable to elect a majority, even counting the delegates at large. The constitution requires an apportionment to be made by 1976. Projection of present population trends to 1970 suggests that in a senate apportionment based on the 1970 census Nassau County will gain two senators, Kings, New York and Bronx will each lose one, and Queens' and Erie's representation will not change. This would result in a 59-member Senate, since the Queens-Nassau total would be nine higher than in the 1894 apportionment. See pp. 24-27, *supra*. Assuming, as is almost certain, that a substantial majority of the state's population will continue to reside in these counties, this majority in 1978 would be able at best to elect only 90 delegates (75 plus 15 at large) out of a total of 192—seven short of a majority.

Thus, by any reasonable standard the majority of the people of the State of New York do not have a practical political remedy available. This Court is their last and only resort to correct the discrimination against them.

CONCLUSION

The judgment of the court below should be reversed and the case remanded with a direction to grant the relief sought in the complaint. Failing such action, the judgment of the court below should be reversed and the case remanded with a direction to admit and consider the evidence excluded at the prior hearing.

Respectfully submitted,

LEO A. LARKIN
Corporation Counsel of the City
of New York
Attorney for Paul R. Screvane,
et al., Appellees

GEORGE H. P. DWIGHT
BENJAMIN OFFNER
of Counsel

September 16, 1963

APPENDIX A

Article I, Section 1, of the New York Constitution reads:

> "No member of this state shall be disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law."

Article II, Section 1, of the New York Constitution reads:

> "Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state for one year next preceding an election, and for the last four months a resident of the county, city, or village and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all the officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided however that no elector in the actual military service of the state, or of the United States, in the army, navy, air force or any branch thereof, or in the coast guard, or the spouse, parent or child of such elector, accompanying or being with him or her, if a qualified voter and a resident of the same election district, shall be deprived of his or

her vote by reason of his or her absence from such election district, and the legislature shall provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes and provided, further, that in any election district in which registration is not required to be personal, no elector who is registered and otherwise qualified to vote at an election, shall be deprived of his or her right to vote by reason of his or her removal from one election district to another election district in the same county within the thirty days next preceding the election at which he or she seeks to vote, and every such elector shall be entitled to vote at such election in the election district from which he or she has so removed.

"Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

APPENDIX B

"Total Representation" in New York State by Counties in Pending Apportionment Based on 1960 Census

IN ACCORDANCE WITH THE METHOD USED BY MR. JUSTICE CLARK IN BAKER v. CARR, 369 U. S. 186, 255 (1962)

County	Population (to nearest thousand)	Representation (to nearest hundredth)	Ratio of Representation to Population (to nearest hundred)
Kings	2,519,000	37.42	1:67,400
Queens	1,733,000	26.16	1:66,200
New York	1,584,000	22.53	1:70,400
Bronx	1,368,000	20.53	1:66,700
Nassau	1,276,000	17.89	1:71,300
Erie	1,040,000	15.89	1:65,400
Westchester	782,000	13.89	1:56,300
Suffolk	650,000	12.89	1:50,400
Monroe	571,000	12.89	1:44,300
Onondaga	415,000	9.26	1:44,600
Albany	269,000	4.63	1:58,500
Oneida	259,000	4.63	1:56,300
Niagara	236,000	4.63	1:51,300
Richmond	217,000	4.63	1:47,200
Broome	210,000	4.63	1:45,700
47 least populous counties (average)	3,112,000	87.47	1:35,600
STATE	16,241,000	300.00	1:54,100 (average)

COUNTIES RANKED BY RATIO OF REPRESENTATION TO POPULATION

Nassau	1:71,300
New York	1:70,400
Kings	1:67,400
Bronx	1:66,700
Queens	1:66,100
Erie	1:65,400
Albany	1:58,500
Westchester	1:56,300
Oneida	1:56,300
STATE AVERAGE	1:54,100
Niagara	1:51,300
Suffolk	1:50,400
Richmond	1:47,200
Broome	1:45,700
Onondaga	1:44,600
Monroe	1:44,300
47 least populous counties (average)	1:35,600

NOTE: It is impossible to compute the representation of individual counties other than the 15 most populous, because it is not known how the 47 least populous counties will be grouped into senate districts.

APPENDIX C

Facsimile of Face of Voting Machine Used in Part of New York County in the General Election on November 5, 1957

PHOTOPRINT

(Mounted Opposite)

	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO	YES / NO

	1 Mayor Vote for one	2 Comptroller Vote for one	3 President of the Council Vote for one	4 Borough President Vote for one	5	6	7	8	9 Justices of the Supreme Court, 1st Judicial District Vote for five	10	11 Justices of the City Court Vote for two	12 Judge of the Court of General Sessions Vote for one	13 District Attorney Vote for one	14 Justice of the Municipal Court, 2nd District Vote for one	15 Member of the County Committee, 69th District Vote for one
REPUBLICAN A	1 A Christenberry	2 A McGahan	3 A Simon	4 A Krukowitch	5 A Atlas	6 A Macchia	7 A Weaver	8 A Cavagan	9 A Aurelio	10 A Coleman	11 A Parella	12 A Carney	13 A Hogan	14 A Raimo	15 A Isaacs
DEMOCRAT B	1 B Wagner	2 B Gorosa	3 B Stark	4 B Jack	5 B Capozzoli	6 B Backer	7 B Amsterdam	8 B Cavagan	9 B Aurelio	10 B Coleman	11 B Parella	12 B Carney	13 B Hogan	14 B Raimo	15 B Gayle
LIBERAL C	1 C Wagner	2 C Gorosa	3 C Stark	4 C Jack	5 C Capozzoli	6 C Backer	7 C Amsterdam	8 C Cavagan	9 C Aurelio	10 C Coleman	11 C Parella	12 C Carney	13 C Hogan	14 C Raimo	15 C Isaacs
SOCIALIST WORKERS D	1 D Cowley	2 D Zuckoff	3 D Kiezel												
SOCIALIST LABOR E	1 E Hass	2 E Emanuel	3 E Emery												
UNITED TAX PAYERS F	1 F Battista	2 F Sussman	3 F Sable												15 F Cort
CITY FUSION G	1 G Wagner	2 G Gorosa	3 G Stark												